



Review of HVNL investigative and enforcement powers

Policy Paper
May 2017



National Transport Commission

Report outline

Title	Review of HVNL investigative and enforcement powers
Type of report	Policy paper
Purpose	To examine whether agencies enforcing the HVNL have sufficient and appropriate investigative and enforcement powers to achieve the objectives of the law.
Abstract	This policy paper provides detailed policy recommendations to ensure agencies enforcing the HVNL have sufficient and appropriate investigative and enforcement powers, including sanctions, to achieve the objects of the law, while maintaining appropriate safeguards.
Key words	Heavy Vehicle National Law, HVNL, Chain of Responsibility, CoR Compliance, Enforcement, Investigation, Sanctions, Remedies, Liability, Authorised Officers, Police
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Foreword

The National Transport Commission (NTC) is an independent statutory body established by the *National Transport Commission Act 2003* (Cth). The NTC has ongoing responsibilities to develop and maintain uniform or nationally consistent road, rail and intermodal reforms to improve safety, productivity and environmental outcomes.

In November 2015 Australian transport ministers agreed to policy recommendations in the NTC's *Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Policy Paper*. One of the recommendations recognised the need to ensure the *Heavy Vehicle National Law* (HVNL) continues to retain an effective investigative and enforcement regime and recommended that a comprehensive review of the relevant chapters of the law be considered by the NTC as a future project.

In June 2016 transport ministers requested the NTC review the HVNL chapters 9 and 10 investigative and enforcement powers, and their application by enforcement agencies, to identify potential regulatory or operational reforms to reduce complexity and improve effectiveness.

This policy paper is the outcome of this review and sets out recommendations to help ensure agencies enforcing the HVNL have sufficient and appropriate investigative and enforcement powers, including sanctions, to achieve the objects of the law, while maintaining appropriate safeguards. These recommendations have been informed by stakeholder feedback on the NTC's *Review of HVNL Investigative and Enforcement Powers Discussion Paper* that was released for public consultation in October 2016.

I would like to thank jurisdictions, stakeholders and NTC staff for their work in preparing this paper.



David Anderson PSM
Chairman

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Executive summary

In June 2016, Australian transport ministers requested the National Transport Commission (NTC) review all investigative and enforcement powers, including sanctions, in chapters 9 and 10 of the *Heavy Vehicle National Law* (HVNL) and their application by enforcement agencies to:

- identify potential regulatory or operational reforms to reduce complexity and improve effectiveness
- ensure agencies enforcing the HVNL have sufficient and appropriate investigative and enforcement powers, including sanctions, to achieve the objects of the law, while maintaining appropriate safeguards.

In October 2016, the NTC published the *Review of HVNL Investigative and Enforcement Powers Discussion Paper* for public consultation. This discussion paper was informed by preliminary consultation with road transport agencies, enforcement agencies and key industry stakeholders and reflects the key issues raised through that process. The NTC received 21 submissions in response to the discussion paper.

This policy paper represents the completion of this review process. It sets out recommendations for regulatory and operational reforms. It also proposes a pathway for better aligning the HVNL with other national safety laws and to ensure the HVNL accords with contemporary regulatory best practice.

Significantly the recommendations include:

- amendments to the HVNL investigative and enforcement power provisions to:
 - enable the new section 570A primary duty information gathering power to be used for the executive officer due diligence obligation and other key identified safety obligations
 - enable a fleet or class of vehicles to be ordered for inspection where there is a reasonable belief the fleet or class is defective
 - empower authorised officers to issue prohibition notices, and
 - enable the courts to issue injunctions
- operational reforms, to be led by the NHVR, including the development of a national compliance and enforcement policy for authorised officers
- subject to terms of reference, scope and approach being agreed by ministers, the NTC commence a comprehensive review of the HVNL July 2021 to consider:
 - the effectiveness of the HVNL framework, including the chain of responsibility (CoR) and executive officer liability (EoL) reforms, and
 - whether any amendments are required to ensure the HVNL is consistent with contemporary best regulatory practice and to more closely align the HVNL with WHS laws so as to improve compliance, safety outcomes and industry productivity.

These reforms have a number of benefits. The legislative changes will remedy many problems identified by stakeholders, make existing provisions clearer and more effective, and address gaps in the HVNL identified by stakeholders. The operational reforms will improve national consistency in the administration and enforcement of the HVNL. Additional sanctions, in particular the introduction of authorised officer issued prohibition notices, will complement the compliance tools already available and provide authorised officers with additional alternatives to prosecution. They will also allow enforcement agencies to better address imminent risks.

The recommendations in this policy paper were endorsed by ministers at their May 2017 meeting.

The NTC will work with jurisdictions and the Parliamentary Counsel's Committee to develop a draft Bill to implement these recommendations. The Bill will be provided to ministers for consideration in November 2017. Where recommendations call for guidance material and training for authorised officers or industry, the NHVR as the national regulator, will lead the development of these materials, with input from enforcement agencies and industry bodies.

The recommendations and questions from the discussion paper are set out below.

National consistency & principles based approach to compliance & enforcement

Recommendation 1:

That the NHVR develop a national compliance and enforcement policy for HVNL authorised officers underpinned by the principles in Safe Work Australia's National Compliance and Enforcement Policy and the Administrative Review Council's The Coercive Information-Gathering Powers of Government Agencies to assist in ensuring a nationally consistent approach to compliance in accordance with principles of natural justice and administrative fairness.

Information-gathering powers

Is there a need to simplify the HVNL information-gathering powers?

Recommendation 2:

Note that, subject to recommendation 6 and recommendation 16 below, the current information gathering approach of the HVNL be maintained: namely, that the new information-gathering power in section 570A for the primary duty be retained; that the existing information-gathering provisions in sections 569 and 570 of the HVNL also be retained and that practical issues be addressed through the development of operational guidance and training.

Is there a need to clarify the form in which information requested may be produced?

Recommendation 3:

That section 569 of the HVNL concerning the power to require the production of documents, be amended to clarify that electronic documents can be required to be produced in readily readable electronic form.

Is there a need to ensure information about past journeys can be obtained?

Recommendation 4:

That section 570 of the HVNL, concerning the power to require information about heavy vehicles, be amended to clarify that information about past journeys may also be requested.

Is there a need to require a responsible person to identify a third party where that person holds relevant records?

Recommendation 5:

(a) That subject to appropriate procedural safeguards, section 570 of the HVNL, concerning the power to require information about heavy vehicles, be amended to enable an authorised officer to require a responsible person for a heavy vehicle to provide the identity of a person whom the authorised officer reasonably believes holds:

- information about the heavy vehicle or
- information required to be kept by the responsible person under the HVNL.

(b) that the NHVR develop procedural guidelines and training for authorised officers on the use of this new provision.

Associated issues raised by stakeholders:

Recommendation 6:

(a) That section 570A of the HVNL be amended to also apply:

- if an authorised officer reasonably believes a person is capable of giving information in relation to a possible contravention of, or to assist in monitoring or enforcing compliance with, the executive officer due diligence obligation under section 26D
- to all safety duties as identified in section 26D (as is to be amended as a consequence of the 2017 HVNL executive officer liability amendments).

(b) That subject to parliamentary counsel's advice, technical amendments be made to address the following:

- inconsistencies in the use of the defined terms ‘information’ (as amended by the 2016 HVNL Amendment Act) and ‘document’ in sections 568, 569, 570, 570A and 577 to ensure there is no ambiguity about the information required, and
- the need for greater legislative clarity in s.570A arising from the decision in *Moosawi v Massey* [2015] QSC.

(c) That the HVNL be amended to enable an authorised officer to require the driver of a heavy vehicle to produce his or her driver’s licence where the driver is required to carry the driver’s licence under another law.

Powers of entry, inspection, search and seizure

Is there a need to simplify the HVNL powers of entry, search and seizure?

Recommendation 7:

Note that, subject to recommendation 16, and the specific amendments noted in these recommendations, any further changes to the HVNL entry, inspection, search and seizure powers be made on a provision by provision basis as evidence of issues are provided by stakeholders, and that operational guidance and training also be developed to address complexities.

Are the limits on the exercise of powers where injury or death occurs necessary?

Recommendation 8:

That section 521 of the HVNL, concerning the power to enter and search a heavy vehicle involved or suspected to be involved in an offence etc, be amended to allow authorised officers who are not police officers to enter a vehicle once directed or authorised to do so by police; and that operational guidance also be developed to assist authorised officers and police in applying section 521 of the HVNL.

Is a broader power to require heavy vehicle inspection necessary?

Recommendation 9:

That section 522 of the HVNL, concerning the power to order the presentation of heavy vehicles for inspection, be amended to:

- (a) apply to heavy vehicles the officer reasonably believes has within the preceding 60 days been used or will be used on a road, and
- (b) enable a prescribed class of authorised officer to require a fleet or class of vehicles to be presented for inspection where the authorised officer has a reasonable belief that the fleet or class of vehicles does not comply with the HVNL or is defective.

Available sanctions and the need for additional remedies

Is there a need for the HVNL to be amended to include additional sanctions?

Recommendation 10:

That chapter 10 of the HVNL be amended to:

- (a) empower authorised officers to issue prohibition notices prohibiting the carrying on of the activity or the carrying on of the activity in a specified way, until the authorised officer is satisfied that the matters giving rise to the risk have been remedied (similar to section 195 of the model WHS Act), and
- (b) enable the courts to issue injunctions:
 - (i) compelling a person to comply with a notice, or restraining a person from contravening a notice issued by an authorised officer (similar to section 215 of the model WHS Act), and/or
 - (ii) requiring a person to cease contravention of the HVNL (similar to section 240 of the model WHS Act).

That training and guidance be developed for authorised officers in the use of prohibition notices.

Is there a need to publish enforcement action outcomes?

Recommendation 11:

That the HVNL be amended to enable the NHVR to publish court outcomes including penalties imposed.

Evidentiary issues

Is there a need to clarify the admissibility of evidence obtained using police powers?

Recommendation 12:

(a) That the HVNL be amended to include a provision clarifying that evidence gathered lawfully using police powers is not inadmissible as evidence in the prosecution of an offence under the HVNL on the grounds that police powers were used to obtain that evidence rather than powers under the HVNL.

(b) That the NHVR in consultation with police forces develop operational guidance and training to clarify the use of evidence lawfully obtained using police powers in HVNL prosecutions.

Is there a need for a speed limiter deemed non-compliance evidentiary provision?

Recommendation 13:

That a stand-alone evidentiary provision relating to vehicle standards breaches for speed-regulated heavy vehicles detected at travelling at or above 115km/h not be included in the HVNL.

Cross-jurisdictional issues

Is there a need to clarify how cross-border offences are investigated and prosecuted?

Recommendation 14:

(a) That the HVNL be amended to include a provision clarifying that evidence lawfully gathered in one jurisdiction is not inadmissible as evidence in the prosecution of an offence under the HVNL in another jurisdiction.

(b) That the NHVR develop operational guidance material and protocols to clarify the use of evidence in cross-border investigations and prosecutions.

Is there a need to clarify information-sharing arrangements between jurisdictions and enforcement agencies?

Recommendation 15:

That the NHVR develop Memoranda of Understanding or other protocols to facilitate the sharing of information for the purposes of the HVNL between enforcement agencies, road transport agencies and the NHVR.

Aligning the HVNL with WHS

The need for a comprehensive review of the entire HVNL?

Recommendation 16:

(a) That ministers agree in principle on the need for the HVNL to better:

- (i) accord with contemporary regulatory best practice, and
- (ii) align with the performance based safety systems approach of other national safety legislation.

(b) That subject to terms of reference, scope and approach being agreed by ministers, the NTC commence a comprehensive review of the HVNL in July 2021 (3 years after commencement of chapter 2 of the 2016 HVNL Amendment Act) to consider:

- (i) the effectiveness of the HVNL framework, including the CoR and EoL reforms, and

(ii) whether any amendments are required to ensure the HVNL is consistent with contemporary best regulatory practice and to more closely align the HVNL with WHS laws so as to improve compliance, safety outcomes and industry productivity.

(c) That the NTC present for ministers approval in November 2020 terms of reference for a comprehensive review of the HVNL, including scope, approach, methodology, timings and costings.

1 Context

Key points

- In June 2016 transport ministers requested the NTC review all enforcement and investigative powers in chapters 9 and 10 of the *Heavy Vehicle National Law* (HVNL).
- This request is a response to jurisdictions' concerns about the additional complexity created as a result of the new information-gathering provision introduced as part of the 2016 HVNL reforms and a desire for a broader review of the chapter 9 and 10 powers and their application by enforcement agencies.
- In October 2016, the NTC released a discussion paper for public consultation. Twenty-one submissions were received.

1.1 Objectives

In 2016, the National Transport Commission (NTC) conducted a review of all investigative and enforcement powers in chapters 9 and 10 of the *Heavy Vehicle National Law* (HVNL), and their application by enforcement agencies, to identify potential regulatory or operational reforms to reduce complexity and improve effectiveness. The purpose of the review was to ensure agencies enforcing the HVNL have sufficient and appropriate investigative and enforcement powers, including sanctions, to achieve the objects of the law, while maintaining appropriate safeguards.

1.2 Background

The purpose of the HVNL investigative and enforcement powers

Investigation and enforcement by authorised officers are essential elements in controlling or regulating activities and ensuring compliance with the HVNL. This is achieved by authorised officers detecting breaches, bringing them to the attention of the alleged offender, requiring corrective or preventative action, applying penalties and providing deterrence. Compliance with the HVNL and, where compliance fails, enforcement of those laws by authorised officers under the HVNL, is important for reasons of the safety of all road users, fairness, protection of the road network and the health and wellbeing of the community.

The 2016 CoR Reforms

On 1 December 2016 the Queensland parliament passed the *Heavy Vehicle National Law and Other Legislation Amendment Act 2016* (2016 HVNL Amendment Act). This Act gives effect to reforms to the CoR and EOL provisions of the HVNL agreed by transport ministers in November 2015 (the CoR Reforms). These amendments reformulate the existing CoR obligations as a positive duty of care, similar to the primary duties in the model WHS Act and introduce a due diligence obligation for executive officers. These amendments are intended to ensure a more outcomes based approach to CoR, promoting a proactive culture of safety and enforcement, and better alignment with Australia's other national safety laws. To support these reforms, the amendments also introduce an additional information gathering power, section 570A, for use specifically for the primary duty.

An indicative date of mid-2018 is proposed for the commencement of these reforms.

This review

This review is a response to concerns raised by enforcement agencies about the additional complexity created as a result of the CoR Reforms. As noted in the October 2016 discussion paper *Review of HVNL Investigative and Enforcement Powers* (the discussion paper), a number of enforcement agencies are concerned about the potential complexity created by the new section 570A information-gathering provision, discussed further in part 2.2 of this policy paper.

This review is also a response to jurisdictions' request for a comprehensive review of investigative and enforcement powers in chapters 9 and 10 of the HVNL, and their application by enforcement agencies.

In June 2016 transport ministers requested the NTC review the HVNL chapters 9 and 10 investigative and enforcement powers, and their application by enforcement agencies, to identify potential regulatory or operational reforms to reduce complexity and improve effectiveness.

In October 2016, the NTC published the discussion paper for public consultation. The discussion paper was informed by preliminary consultation with road transport agencies, enforcement agencies and key industry stakeholders, and reflects the key issues raised by stakeholders through that process.

The discussion paper therefore considered the following issues, outlining options to address them and including draft proposals:

Information-gathering powers

- Is there a need to simplify the HVNL information-gathering powers?
- Is there a need to clarify the form in which information requested may be produced?
- Is there a need to ensure information about past journeys can be obtained?
- Is there a need to require a responsible person to identify a third party where that person holds relevant records?

Powers of entry, inspection, search and seizure

- Is there a need to simplify the HVNL powers of entry, search and seizure?
- Are the limits on the exercise of powers where injury or death occurs necessary?
- Is a broader power to require heavy vehicle inspection necessary?

Available sanctions and the need for additional remedies

- Is there a need for the HVNL to be amended to include additional sanctions?
- Is there a need to publish enforcement action outcomes?

Evidentiary issues

- Is there a need to clarify the admissibility of evidence obtained using police powers?
- Is there a need for a speed limiter deemed non-compliance evidentiary provision?

Cross-jurisdictional issues

- Is there a need to clarify how cross-border offences are investigated and prosecuted?
- Is there a need to clarify information-sharing arrangements between jurisdictions and enforcement agencies?

For each issue and the discussion paper draft proposals, stakeholders were asked to identify the impacts on their business/agency or the way in which they conducted their operations if the draft proposals were to be adopted. Stakeholders were also invited to provide any additional comment, information or data that they considered relevant to be taken into account as part of this review.

The stakeholder submissions received provided limited additional information. What additional information provided was anecdotal and qualitative rather than quantitative. Many stakeholders considered there was a need to wait until the CoR Reforms had been used and the NHVR fully operational, before making any major changes to the investigative and enforcement powers of the HVNL.

1.3 Consultation process

In response to the discussion paper 21 submissions were received from:

- Amy Gillett Foundation (AGF)
- Australian Livestock and Rural Transporters Association (ALRTA).
- Australian Logistics Council (ALC)
- Australian Trucking Association (ATA)
- Cement Concrete & Aggregates Australia (CCAA)
- Department of Economic Development, Jobs, Transport and Resources, Victoria (DEDJTR)
- Department of Infrastructure, Planning and Logistics, Northern Territory (DIPL NT)
- Department of Justice and Community Safety, ACT (DJCS)

- Department of Planning, Transport and Infrastructure, South Australia (DPTI)
- Department of Transport and Main Roads, Queensland (TMR)
- Gas Energy Australia (GEA)
- King Christopher & Associates Solicitors & Road Transport Lawyers
- National Road Transport Association (NatRoad)
- National Heavy Vehicle Regulator (NHVR)
- New South Wales Police (NSW Police)
- Queensland Police Service (QPS)
- South Australia Police (SA Police)
- South Australian Road Transport Association (SARTA)
- Transport for New South Wales (TfNSW)
- Victoria Police
- Victorian Transport Association (VTA).

This policy paper summarises the stakeholder feedback received, draws conclusions and provides recommendations for ministers' consideration.

2 Key issues identified by stakeholders

Key points

Stakeholders have identified a number of issues with the HVNL investigative and enforcement powers provisions. These issues relate to:

- the complexity of the current investigative and enforcement provisions
- complexity arising from the addition of the new section 570A information-gathering powers
- state and territory differences in applying the investigative and enforcement powers provisions
- the need for any new investigative and enforcement powers to be clearly justified, proportionate to the policy objective to be achieved, and to include appropriate safeguards
- operational issues and gaps, such as the need for a principles based approach to investigation and enforcement powers.

Both enforcement agencies and industry have identified issues with the HVNL investigative and enforcement powers provisions. These issues arise as both framework issues and as concerns with the operation and effectiveness of individual provisions in the HVNL. The identification of these limitations is therefore an opportunity to improve the HVNL investigative and enforcement powers provisions to better enhance compliance and enforcement, resulting in a greater focus on road transport safety.

This part details the key issues raised by stakeholders as part of the preliminary consultation undertaken in preparing the discussion paper and also the additional issues raised by stakeholders in the submissions received in response to the discussion paper.

2.1 Complexity of current Chapter 9 provisions

As noted in the discussion paper, enforcement agencies have concerns that the existing HVNL power of entry provisions are overly complex. In particular, road transport agencies have stated that the distinctions in the HVNL between 'places' and 'vehicles', and 'monitoring' and 'investigation' are confusing and unnecessary. There is a concern these distinctions are confusing and complex, and may result in the inadvertent misuse of powers, with the consequence that prosecutions may be challenged on evidentiary grounds.

These concerns are discussed further in part 4 of this policy paper.

2.2 Complexity arising from new information-gathering power

New section 570A provides authorised officers with an additional information-gathering power specific for use for the new primary duty introduced as a part of the CoR Reforms. This provision significantly strengthens the power of authorised officers to gather information, in particular from third parties. However the result is that there will be three distinct information-gathering powers available to authorised officers under the HVNL, with the potential that all of the powers may be exercised for the same substantive offence.

A number of enforcement and road transport agencies are concerned that this additional information-gathering power may create further complexity. There is concern that these changes may result in an increase in the number of prosecutions that may fail due to technical reasons where authorised officers inadvertently collect information using a power which did not apply to the offence alleged or the class of person providing the information.

Some enforcement agencies are also concerned about the limitation of the new section 570A information-gathering power, in that it only allows an authorised officer to obtain information relevant to possible contraventions of, or compliance with the primary duty of care and not the HVNL generally. In particular, there is a view by some enforcement agencies that this limitation is unnecessary and should be removed, with the effect that the new information-gathering power be broadened to apply to the whole of the HVNL.

However, other enforcement and road transport agencies do not share this view and instead see the constraints on the exercise of the new section 570A information-gathering power as an important safeguard. This is discussed further in part 2.4 below.

This divergence of stakeholder views was also reflected in the submissions received in response to the discussion paper and is discussed further in part 3 of this policy paper.

2.3 Consistent application of law

There are differences across states and territories in how breaches of the HVNL are investigated and enforced. Enforcement agencies often have different approaches and priorities. This impacts industry perceptions regarding the fairness and effectiveness of enforcement, and national consistency in applying the HVNL.

As the discussion paper notes, both industry and the NHVR have emphasised the need to ensure that the investigative and enforcement powers of the HVNL are interpreted and applied consistently by all participating states and territories.

These views were also reflected in the stakeholder submissions received in response to the discussion paper and are discussed further in part 4 of this policy paper.

2.4 Balancing the need for appropriate investigative and enforcement powers with the need to ensure appropriate human rights safeguards

Industry stakeholders have also emphasised the need to ensure that any proposals for legislative change to the investigative and enforcement powers of the HVNL are clearly justified, that the powers are proportionate to the policy objectives to be achieved, and that there is sufficient regard given to the rights and liberties of individuals in accordance with applicable legislative standards. This includes identifying why any additional powers or changes to existing powers are required to mitigate public safety risks, and why the existing law is deficient. This also includes ensuring that any changes include appropriate procedural safeguards and human rights protections.

These concerns have also been raised in the stakeholder submissions received in response to the discussion paper and are discussed further in parts 3, 4 and 5 of this policy paper.

2.5 Additional issues raised through the discussion paper consultation process

Through the discussion paper submissions, a number of additional issues have been raised by stakeholders. Issues relating to information-gathering powers and entry, search and seizure powers are included in the relevant parts of this policy paper (parts 3 and 4). Part 8 of this paper considers stakeholders proposal for a further review. Key additional issues raised by stakeholders not addressed in other parts of this policy paper are outlined below.

A principles based approach

TfNSW, NatRoad and CCAA suggest that both this review and operational practice should be better informed by a principles based approach.

Part 2.3 of the discussion paper discussed the issue of whether a national enforcement and compliance policy was needed, and referred to Safe Work Australia's *National Compliance and Enforcement Policy* which sets out the principles that underpin all work health and safety compliance and enforcement activities.

NatRoad endorses the use of these principles and also the principles established by the Administrative Review Council in its 2008 report *The Coercive Information-Gathering Powers of Government Agencies*. NatRoad recommends these principles be adopted:

as appropriate guiding principles in examining changes to the law especially in the context of moving to the new risk-based model.

NatRoad is of the view that these principles are relevant to the functions of all administrative agencies, especially those which are using coercive information-gathering powers.

Likewise, in the context of ensuring a balance between sufficient enforcement and investigative powers to ensure compliance with the objects of the HVNL, and adequate safeguards for duty holders and third parties, the CCAA also suggests similar key principles be adopted.

Functions of authorised officers

Consistent with the functions of the NHVR in section 659 of the HVNL to:

- monitor compliance with the law,
- identify and promote best practice methods, and
- encourage and promote safe, productive business practices,

the NHVR would like its authorised officers to undertake a greater role in providing compliance information and advice to operators, including through visits to their premises. The NHVR considers this would provide the opportunity to identify and treat problems and safety risks before they eventuate and would be a preventative and cost efficient deployment of NHVR resources, with substantial benefit for industry and the public.

Section 479 of the HVNL describes authorised officers' functions, but does not include providing information and advice about compliance. Inclusion of such a function would align the provision with section 160 of the model WHS Act.

NHVR is concerned that without this amendment, if a claim in negligence arose as a result of an operator's reliance on the authorised officer's information or advice, the authorised officer would not be covered by the personal protection against liability for things done or omitted to be done in good faith in section 698 of the HVNL.

Interaction of the HVNL with the *Interstate Road Transport Act 1985 (Cth)*

DPTI suggests that the relationship between the enforcement provisions of the HVNL and the *Interstate Road Transport Act 1985 (Cth)*, which establishes a registration scheme for heavy vehicles engaged in interstate trade, require clarification. In particular, DPTI comments on the discussion paper that:

The interaction with the Interstate Road Transport Act (Cth), including inconsistency with the HVNL, has previously been identified as a discussion gap.

Operational practices

Several stakeholder submissions also raise issues relating to enforcement agency operational practices.

King Christopher & Associates, a road transport law firm, is concerned about enforcement agency delay in issuing improvement notices. The submission notes that such delays are:

contrary to the rationale which underpins the utility of an Improvement Notice and ... quick and effective implementation of improved policies and procedures.

GEA raises concerns regarding the cost of retaining jurisdictional differences in administering the HVNL. GEA provides the example of a defect in NSW needing to be cleared by a NSW authorised repairer even if the vehicle was going into another state or territory where the operator had workshop facilities. GEA suggests that:

improvements could be made in the process for clearing defect notices so that an inter-jurisdictional operator could clear defects and address sanctions from their main base of operations.

The NTC notes this situation may be improved once the amendments in the 2016 HVNL Amendment Act come into operation. New section 521A will provide authorised officers with the option of issuing a self-clearing defect notice if the vehicle is defective but the use of the vehicle does not pose a safety risk.

The ALC suggests that, to help ensure better national consistency in enforcement practices:

non-police enforcement officers should be in an employee/employer relationship with the NHVR and required to use Regulator designed guidelines and enforcement doctrines, which are reinforced by a culture developed from having all enforcement officers belonging to a single organisation.

Part 3.4 of the discussion paper noted the training activities the NHVR is undertaking to ensure consistency in the way the HVNL investigative and enforcement powers are exercised nationally, including the development of a national investigations manual; providing training to prosecutors, particularly in CoR issues; and building an investigator development program.

Conclusions

The NTC considers that the principles in Safe Work Australia's *National Compliance and Enforcement Policy* and the Administrative Review Council's *The Coercive Information-Gathering Powers of Government Agencies* could be used to underpin a HVNL Compliance and Enforcement Policy. Developing such a policy is consistent with the NHVR's functions to:

- identify and promote best practice methods for complying with the HVNL; and
- work collaboratively with other law enforcement agencies to ensure a nationally consistent approach for enforcing contraventions of laws involving heavy vehicles.

It is also consistent with the finding of the NTC's June 2014 *Heavy Vehicle Compliance Review Final Report* regarding the usefulness of a published NHVR compliance and enforcement policy.

A HVNL Compliance and Enforcement Policy could sit under the NHVR's strategic plan and the principles could then be reflected in the NHVR's operational and education material on the use of compliance and enforcement powers. This would provide a framework for a nationally consistent approach to ensuring compliance in accordance with principles of natural justice and administrative fairness.

As noted below at recommendation 1, the NTC considers that the NHVR should develop a national compliance and enforcement policy for HVNL authorised officers.

However, the NTC considers that expanding authorised officers' functions to specifically include the provision of information and advice on compliance with the HVNL, is not appropriate at this time. Several stakeholders have noted that the protection from personal liability under section 698 of the HVNL already extends to the functions of the regulator and therefore authorised officers under section 659 of the law. In particular, these functions include identifying and promoting best practice methods for compliance with the law and encouraging and promoting safe and productive business practices. Noting the NHVR's concerns, the NTC considers that this matter could be explored further, either through the NTC's HVNL Maintenance Group or as part of the proposed further review of the HVNL, discussed later in this paper.

The NTC considers that the interaction of the HVNL with the *Interstate Road Transport Act 1985* (Cth) is an issue outside of the scope of this review. However, it is an issue the NTC could investigate in the future.

Finally, the NTC considers that the issues raised by King Christopher & Associates, GEA and the ALC are operational matters that could be considered further by the NHVR.

Recommendation 1

That the NHVR develop a national compliance and enforcement policy for HVNL authorised officers underpinned by the principles in Safe Work Australia's National Compliance and Enforcement Policy and the Administrative Review Council's The Coercive Information-Gathering Powers of Government Agencies to assist in ensuring a nationally consistent approach to compliance in accordance with principles of natural justice and administrative fairness.

3 Information-gathering powers

Key points

- Some stakeholders have concerns that the new section 570A primary duty information-gathering power may create unnecessary additional complexity and may lead to information gathered for an offence using one power being inadmissible for another associated offence.
- Stakeholders' views diverge on the need to simplify the information-gathering powers. Some view simplification and closer alignment with the model WHS Act as essential. Others consider the current approach supplemented by operational guidance a good balance between effective enforcement and human rights.
- This part proposes amendments to enable the new section 570A primary duty information gathering power to be used for the executive officer due diligence obligation and other key identified safety obligations.
- This part also proposes a number of technical amendments to help improve effectiveness, including enabling a fleet or class of vehicle to be ordered for inspection where there is a reasonable belief the fleet or class is defective..

3.1 Existing legal framework

Information gathering is an essential aspect of law enforcement. Information-gathering powers are necessary to enable the monitoring of compliance with the law, and to investigate alleged contraventions. Where necessary information is not able to be obtained voluntarily, the HVNL includes coercive powers to require it. The information obtained can then be used as evidence in the prosecution of an alleged offence.

The HVNL contains a number of different information-gathering power provisions each with a specific purpose and applicable to specific classes of person:

- section 567 of the HVNL empowers authorised officers to require the name, address and date of birth of a person in certain circumstances
- section 568 of the HVNL empowers an authorised officer to require a driver to produce documents, devices and things required to be in his or her possession
- section 569 of the HVNL empowers authorised officers to require a responsible person¹ for a heavy vehicle to provide documents issued to the person or required to be kept by the person under the HVNL, or to provide documents in the person's possession or under the person's control, relating to a heavy vehicle or to any business practices
- section 570 of the HVNL empowers authorised officers to require for compliance purposes, a responsible person for a heavy vehicle to provide information about the vehicle, its load or equipment, and personal details of other responsible persons for the vehicle, including information about the current or intended journey of the vehicle.

As a part of the CoR Reforms, the 2016 HVNL Amendment Act includes an additional information-gathering power solely for use for the new primary duty obligation. This new provision, section 570A, empowers specified classes of authorised officers, including police, to require from any person information about a possible contravention of, or to monitor or enforce compliance with, the primary duty. Section 570A includes protection from self-incrimination similar to section 172 of the model WHS Act, as well as the following other safeguards:

- the exercise of the power is restricted to authorised officers approved by the NHVR or the relevant commissioner of police;
- the officer must reasonably believe the person is capable of giving information about a suspected primary duty offence;
- if required to give oral evidence, the person may appear with a legal practitioner;

¹ 'Responsible persons' is defined in Section 5 of the HVNL.

- evidentiary immunity for any information given by a person in compliance with the provision, including any information directly or indirectly derived from that information, with the effect that such information is not admissible as evidence against that person.

3.2 Is there a need to simplify the HVNL information-gathering powers?

A number of enforcement and road transport agencies are concerned that the interaction of sections 569 and 570 with the proposed new section 570A information-gathering power will create complexity and difficulty in conducting investigations and prosecutions. In particular, there is concern this may result in evidence being inadmissible on technical legal grounds and prosecutions failing. A number of enforcement agencies and some road transport agencies have suggested that this complexity would be avoided if there was a single information-gathering power, modelled on section 155 of the model WHS Act. As an alternative, it has been suggested that all three HVNL information-gathering powers should be available for all offences under the HVNL.

To address the concerns raised the discussion paper identified three options:

Option 1: Simplify the information-gathering powers by applying the new information-gathering power across the entire HVNL and removing the existing information-gathering provisions in sections 569 and 570 of the HVNL.

Option 2: Apply the new information-gathering power across the entire HVNL and retain the existing information-gathering provisions in sections 569 and 570 of the HVNL.

Option 3: Maintain current information-gathering approach: retain the new information-gathering power for the primary duty only; retain the existing information-gathering provisions in sections 569 and 570 of the HVNL and address any practical issues through the development of operational guidance and training.

Discussion paper proposal

The discussion paper proposed option 3 be adopted on the basis this option would provide an appropriate and proportionate balance between human rights and effective enforcement.

Stakeholder feedback

There is a divergence of stakeholder views on the need to simplify the information-gathering powers.

On one hand, DEDJTR, TMR, DPTI, DJCS, SA Police, NSW Police, Victoria Police, ALC, CCAA, NatRoad, GEA, and VTA support option 3 – retention of the current information gathering process. These stakeholders consider this approach:

- provides a balance between powers which can be used immediately in the field, without the need for a written notice or the need to form a reasonable belief and the more extensive powers required to investigate chain of responsibility offences
- does not require an extension of power and consequent need to justify against human rights charters
- enables correct use of the powers to be addressed through operational guidance and training.

DEDJTR considers that the evidentiary:

safeguards available under the HVNL would be insufficient to protect human rights if section 570A were applied across the whole of the HVNL (option 1).

Victoria Police also agree with this approach, stating:

the replacement of s569 and s570 with s570A, would result in significant impracticality at the roadside when seeking information about a journey or the vehicle.

TMR also supports option 3 and considers that:

operational guidelines and training will address concerns regarding complexity and will improve consistency and reduce errors by investigators.

DPTI supports this approach:

for the time being, noting our support for NSW's 'general duties' approach, including a broader review of the HVNL.

On the other hand TfNSW, SARTA, ALRTA, NHVR, and QPS consider maintaining the current approach (option 3) will create additional complexities detrimental to effective enforcement. Instead, these stakeholders support option 1 because simplifying the information-gathering powers would:

- reduce complexity resulting from multiple provisions with different coverage and self-incrimination rules
- increase consistency with the model WHS Act
- make training and guidance material simpler
- make it easier for industry to understand
- enable authorised officers to obtain timely information from chain and other parties and more effective enforcement of breaches by off-road chain parties
- protect human rights through the safeguards in s.570A.

In particular, TfNSW supports simplifying the information-gathering powers and considers that:

applying section 570A across the entire HVNL is the only way to avoid issues around the inadmissibility of evidence.

This position is supported by the NHVR. The NHVR also states that:

uncertainty and complexity in the law will impose greater demands on NHVR legal and compliance staff members generally, and is likely to lead to more litigation with the expense and delay that entails.

In addition, the ATA, whose position is also held by ALRTA and SARTA, considers that:

the HVNL must ensure that the NHVR and agencies are able to get to and deal appropriately with any party in the Chain, including and especially those who are more remote from the steering wheel and outside the trucking businesses.

Conclusions

The NTC considers that at this time there is insufficient evidence to support changes to the information-gathering provisions of the HVNL.

The NTC notes the views of many stakeholders that the complexity can be managed under the current approach (including new section 570A) together with the development of operational guidance and training. Subject to the additional matters raised by stakeholders and the resulting recommendations 6 and 16 discussed later in this policy paper, the NTC recommends retaining the new information-gathering power for the primary duty only; retaining the existing information-gathering provisions in sections 569 and 570 of the HVNL and addressing any practical issues through the development of operational guidance and training.

Part 8 discusses the issue of greater alignment between the HVNL and model WHS Act and proposes a comprehensive review of the HVNL. The review would include whether any amendments are required to more closely align the HVNL with WHS laws including whether there is a need to simplify the HVNL information-gathering powers to align with WHS.

Recommendation 2

Note that, subject to recommendation 6 and recommendation 16 below, the current information gathering approach of the HVNL be maintained: namely, that the new information-gathering power in section 570A for the primary duty be retained; that the existing information-gathering provisions in sections 569 and 570 of the HVNL also be retained and that practical issues be addressed through the development of operational guidance and training.

3.3 Is there a need to clarify the form in which information requested may be produced?

Under section 569 of the HVNL an authorised officer is empowered to require the production of documents from a responsible person for a heavy vehicle. Where documents are in electronic form, section 569 of the HVNL requires the 'making available or production of a clear written reproduction of the electronic document'. As noted in the discussion paper, under the HVNL there is currently no power for an authorised officer to require an electronic document to be made available in electronic form.

For some electronic information, such as telematics data, it is preferable to have the electronic document made available in electronic format. However, currently, if electronic data is requested, then in accordance with section 569 of the HVNL that data must be provided in hard copy. This may amount to hundreds of pages of documents which then have to be converted into electronic format before being able to be analysed.

To address this anomaly a number of enforcement agencies have suggested that section 569 of the HVNL should be amended to clarify that an electronic document can be required to be produced in electronic form.

Discussion paper proposal

The discussion paper proposed section 569 of the HVNL be amended to clarify that electronic documents can be required to be produced in electronic form. The discussion paper noted that such an amendment acknowledges the prevalence of electronic data and simplifies the production of requested documents. The discussion paper noted that by reducing the administrative burden on both industry and enforcement agencies such an amendment would contribute to the more effective operation of the HVNL.

Stakeholder feedback

All stakeholders support amending section 569 of the HVNL to clarify that electronic documents can be required to be produced in electronic form.

However, industry warned that any such amendment must not increase operators' costs or require unnecessary access to business system programs and data bases. For example, NatRoad cautioned that any such requirement must be 'reasonable and practicable for the business concerned' and must not require the production of electronic information in a format a business software does not support. Similarly the VTA and the ALRTA were of the view that under any such provision, software and full working models should not need to be supplied.

Similarly, enforcement agencies also emphasised the need to ensure that the information provided is in a format that is readily accessible and readable.

Conclusions

Based on the stakeholder feedback received, the NTC considers that section 569 of the HVNL should be amended to enable the production of documents in a readily readable electronic form. Such an amendment will simplify and accelerate the production of requested documents, resulting in savings to both industry, in compliance costs, and enforcement agencies, in reviewing the documents provided.

Recommendation 3

That section 569 of the HVNL concerning the power to require the production of documents, be amended to clarify that electronic documents can be required to be produced in readily readable electronic form.

3.4 Is there a need to ensure information about past journeys can be obtained?

Section 570 of the HVNL empowers authorised officers to require information about the ‘current or intended’ journey of heavy vehicles for compliance purposes. As noted in the discussion paper, an enforcement agency has suggested that section 570 of the HVNL should be amended to expressly provide that information about ‘past’ journeys may also be requested.

Although principles of statutory interpretation suggest the use of ‘without limitation’ in section 570 of the HVNL means information about past journeys is not excluded, an amendment to this section would remove this ambiguity and the potential concern that the evidence relating to past journeys may be challenged in court.

Discussion paper proposal

The discussion paper proposed section 570 of the HVNL be amended to ensure information about past journeys may be required.

Stakeholder feedback

All but two stakeholders support amending section 570(2) of the HVNL. TfNSW does not support the amendment, considering that it is unnecessary and that the issue could be addressed by operational guidelines, or by applying section 570A across the whole HVNL. The VTA also does not support an amendment but provides no explanation.

The NHVR is supportive noting:

the ability to require documentation relevant to past journeys is critical to investigating primary duties conformance.

NatRoad supports the proposal but considers:

that section 570(4) should be expanded to ensure that journeys more than 3 years prior are specifically excluded based on the record keeping requirements.

Conclusions

Based on the stakeholder feedback received, the NTC considers section 570 of the HVNL, concerning the power to require information about heavy vehicles, should be amended to clarify that information about past journeys may also be requested. Such an amendment will address stakeholder concerns regarding the perceived ambiguity of section 570 of the HVNL and will ensure that information about a vehicle’s past journeys (including its intended route) can be obtained and used in evidence without risk of challenge which could delay proceedings and increase costs.

Recommendation 4

That section 570 of the HVNL, concerning the power to require information about heavy vehicles, be amended to clarify that information about past journeys may also be requested.

3.5 Is there a need to require a responsible person to identify a third party where that third party holds relevant records?

Sections 569 and 570 of the HVNL enable an authorised officer to require specified documents or information from responsible persons. However, under both these provisions there is no ability to require a responsible person who does not have the information to identify a third party, such as a service provider, who does hold it.

Investigators may be aware of the existence of the information but not know who is holding it. An enforcement agency has suggested that both section 569 and section 570 of the HVNL should be

amended to enable an authorised officer to require a responsible person to identify such third parties.

Discussion paper proposal

The discussion paper proposed sections 569 and 570 of the HVNL not be amended to require responsible persons to identify third parties who hold documents or information relevant to the investigation of an offence (option 1) on the basis that the potential human rights, procedural fairness and natural justice concerns outweighed the identified advantages of a change.

Stakeholder feedback

Stakeholders are divided on the need to require a responsible person to identify a third party where that third party holds relevant records.

DEDJTR, TMR, DJCS, ALC, NatRoad, ATA and VTA support the discussion paper proposal for no change. These stakeholders consider that an amendment would require responsible persons to divulge the details of third parties who have no statutory obligations under the HVNL and raise human rights, procedural fairness and natural justice considerations for the third parties so identified. There is also concern that identifying the third party may result in the discovery of evidence exposing the responsible person to liability, thereby acting as a type of self-incrimination.

For example, DEDJTR supports no change and considers that:

a requirement to provide information about a third party who holds relevant records may engage the privilege against self-incrimination which is protected by the [Victorian] Charter [of Human Rights and Responsibilities Act 2006] and is not something that should be done without very strong justification.

Likewise, TMR is sympathetic to the need to be able to readily identify third parties, but notes that:

consideration would need to be given to how to mitigate concerns in relation to natural justice (Fundamental Legislation Principles).

NatRoad also supports no change and considers that:

responsible persons would be required to disclose the details of third parties who have no statutory obligations under the HVNL. This raises issues of human rights and procedural fairness.

However, TfNSW, DPTI, QPS, Victoria Police, SA Police, NSW Police, SARTA, NHVR, ALRTA and CCAA all support legislative change. These stakeholders considered that third parties would be protected by the safeguards available under section 570A, including protection against self-incrimination. They also suggest that without the amendment, operators seeking to avoid compliance would increasingly engage third parties to manage data and records, thereby making the information more difficult to access for enforcement purposes. Operators who refused to say who held the relevant information could avoid sanctions or penalties that would apply to operators who held the information themselves or used third parties who authorised officers were able to identify by other means.

For example, the ALRTA supports legislative change commenting:

the success of CoR enforcement will largely rest with the ability of HVNL authorised officers to obtain timely information from chain parties and others that they deal with as part their road transport operations and related activities.

This position is supported by Victoria Police who considers such an amendment is:

not outside the bounds of procedural fairness or in breach of Human Rights as third parties are not incriminated through this process and have not committed any offence – they simply have possession of information that would be relevant to an investigation.

Similarly, QPS also supports amending the law on the basis it:

would resolve any possible issue of responsible persons storing information off-site in the hands of 3rd party companies or individuals.

Conclusions

Although stakeholders' views diverge, the NTC is persuaded by the responses of stakeholders in favour of changes to the law. The NTC is of the view the law should be amended to require responsible persons to identify third parties who hold documents or information relevant to the investigation of an offence, provided there are adequate human rights and natural justice protections.

The NTC considers that without such an amendment there is a risk that operators will place relevant information with third parties as a means of making the information inaccessible or more difficult (and costly) for authorised officers to access. Although the discussion paper considered amendment to both sections 569 and 570 of the HVNL, the NTC considers that only section 570 needs to be amended at this time. This section already has a requirement for a responsible person to identify another responsible person for the vehicle.

The NTC considers a third party who was identified by a responsible person could only be required to provide the information under section 570A and that the safeguards in this section are sufficient to address the requirements of human rights charters or fundamental legal principles for third parties.

If the third party then provided documents which showed the responsible person had committed an offence against the HVNL, those documents could be used in evidence against the responsible person, in the same way as documents held directly by a responsible person and required under section 570 of the HVNL. A possible safeguard could be to restrict the information that can be used against the responsible person to documents.

The NTC considers that without a provision requiring a responsible person to provide the name of a third party who holds relevant information, some prosecutions may not be possible, or would require far greater investigative resources than may be available. Accordingly the NTC is of the view that such an amendment is necessary and any potential infringement or limitation of the responsible person's human rights is justifiable on compliance and enforcement grounds.

Recommendation 5

(a) That subject to appropriate procedural safeguards, section 570 of the HVNL, concerning the power to require information about heavy vehicles, be amended to enable an authorised officer to require a responsible person for a heavy vehicle to provide the identity of a person whom the authorised officer reasonably believes holds:

- *information about the heavy vehicle or*
- *information required to be kept by the responsible person under the HVNL.*

(b) that the NHVR develop procedural guidelines and training for authorised officers on the use of this new provision.

3.6 Associated issues raised by stakeholders

Extend section 570A of the HVNL to executive officer due diligence obligation

Several stakeholders have noted that the new section 570A only applies to the CoR primary duty obligation under section 26C and does not apply to the EOL offence in section 26D. This means:

those "further down the chain" will be subject to a more rigorous information-gathering power than executive officers "at the top". This is clearly inequitable and obviously not in the spirit of a general duty which is attempting to extend responsibility across all parties, particularly leaders who can particularly influence a safety culture.

Technical amendments to the information-gathering powers

Stakeholders also raised the following issues about the information-gathering powers.

- The NHVR, TMR and TfNSW are concerned that the use of 'document' and 'information' in sections 568, 569, 570, 570A and 577 and the definition of 'information' are inconsistent

and ambiguous, and that this may cause confusion for authorised officers and industry as to what information can be requested from parties and to potential arguments and delays in the courts

- TMR is concerned that the decision in *Moosawi v Massey* [2015] QSC suggests the need for greater legislative clarity in section 570A to ensure there is a power to compel attendance in person to answer questions. This case considered whether section 228(3) of the *Health Ombudsman Act 2013* (Qld), gave an inspector power to compel attendance at an interview. Section 228(3) provides:

The authorised person may, by notice given to the person, require the person to give the authorised person information related to the offence, or matter being investigated, at a stated reasonable time and place.

In *Moosawi v Massey* the Queensland Supreme Court found:

- the power to require attendance and to interrogate the person attending, whether on oath or not, is a power which 'substantially intrudes upon the liberties of the person summonsed'. In particular the court held that there must be 'a clear statement before legislation will be interpreted to abrogate 'fundamental principles, infringe rights, or depart from the general system of law'".
- that a notice to attend and engage in an interrogative process is such an interference with the rights and liberties of the person receiving it that it could only be authorised by clear words.

Require production of driver's licence

The NHVR suggests the HVNL should be amended to include a power for an authorised officer to require a driver to produce his or her driver's licence. Section 568 of the HVNL empowers an authorised officer to require a driver to produce documents, devices and things required under the HVNL to be in his or her possession. However there is no requirement in the HVNL for a driver to carry their driver's licence. In contrast all jurisdictions have licensing laws that require the driver of a heavy vehicle to carry their licence while driving, although there are State and Territory variations (eg in Victoria, the requirement is restricted to vehicles with a GVM greater than 15 tonnes).

A driver's licence shows the class of licence a driver holds and whether the driver holds an appropriate class for the vehicle being driven. Road safety is at risk if an unqualified driver is operating a heavy vehicle. In addition, a driver must record his or her driver's licence number in the driver's work diary, and the power to require production of the driver's licence would assist the enforcement of driver fatigue requirements.

Warning about consequences of failing to comply with a requirement

Several industry stakeholders raise the possibility of adding to the HVNL a warning provision comparable to section 173 of the model WHS Act, which requires an inspector to warn a person of the consequences of failure to comply with a requirement and the rights against self-incrimination and to legal professional privilege. However, no supporting evidence has been provided of a problem with the current operational practice by authorised officers under the HVNL.

Extend power to access electronic documents

TMR suggests that to keep pace with technological developments, and the increased storage of documents electronically, amendments to the HVNL information-gathering powers are required to enable authorised officers to request access (eg. passwords) on electronic devices that may contain relevant information.

Extend type of documents required to be produced under section 569 of the HVNL

TfNSW suggests the power in section 569 to require production of documents is inadequate because it does not extend to all information that could be relevant to a possible contravention, in particular, it does not extend to contracts between parties.

Require information to be stored in Australia

Victoria Police is concerned that CoR parties may store information about their transport activities outside Australia, which may cause delays in making the information available or make it difficult for authorised officers to gain access by warrant or subpoena where a party declines to provide it.

Conclusions

Currently, the information-gathering power in section 570A of the HVNL only applies to investigation of breaches of the primary duty by CoR parties. It is not available in relation to executive officers regarding their due diligence obligation to ensure their corporation complies with the primary duty. A greater power to gather information therefore exists in relation to employees who are CoR parties than to executive officers who are the leaders of the organisation.

The NTC agrees with TfNSW's proposal that section 570A should also apply to the executive officer due diligence obligation under section 25D. In the NTC's view such an amendment is consistent with the policy intent of the primary duty to extend responsibility across all parties who can influence a safety culture. In addition, and to ensure consistency with the policy intent underpinning the recent CoR and EoL reforms, the NTC considers section 570A should also apply to all safety duties as identified in section 26D (as is to be amended as a consequence of the 2017 HVNL executive officer liability amendments). This would ensure that this power is available for all key safety duties under the HVNL.

The NTC considers the technical concerns about the inconsistencies in the use of 'information' and 'document' across the information-gathering powers of the HVNL raised by NHVR, TMR and TfNSW should be resolved by amendments, subject to advice from parliamentary counsel. This will remove ambiguity and the uncertainty this creates for industry, authorised officers and the courts.

The NTC also considers the technical concern raised by TMR about whether the decision in *Moosawi v Massey* [2015] QSC restricts the power in section 570A to compel attendance in person to answer questions should also be clarified by amendment to the HVNL, subject to advice from parliamentary counsel. This clarification will ensure the intent of the section is preserved.

The NTC supports the NHVR proposal that the HVNL should be amended to include a requirement for a driver to produce his or her driver's licence to an authorised officer on request. The NTC is of the view that this should only apply where the driver is required to carry the licence under another law so as not to increase the regulatory burden on heavy vehicle drivers or create inconsistency between driver licensing laws and the HVNL. The NTC considers this power would be a useful road safety enforcement tool.

The NTC considers the remainder of the associated issues raised by stakeholders could be referred to the NTC's HVNL Maintenance Group for detailed investigation and consideration or if broader policy issues are raised, be considered as part of the proposed further review of the HVNL.

Recommendation 6

(a) That section 570A of the HVNL be amended to also apply:

- if an authorised officer reasonably believes a person is capable of giving information in relation to a possible contravention of, or to assist in monitoring or enforcing compliance with, the executive officer due diligence obligation under section 26D
- to all safety duties as identified in section 26D (as is to be amended as a consequence of the 2017 HVNL executive officer liability amendments).

(b) That subject to parliamentary counsel's advice, technical amendments be made to address the following:

- inconsistencies in the use of the defined terms 'information' (as amended by the 2016 HVNL Amendment Act) and 'document' in sections 568, 569, 570, 570A and 577 to ensure there is no ambiguity about the information required, and
- the need for greater legislative clarity in s.570A arising from the decision in *Moosawi v Massey* [2015] QSC.

(c) That the HVNL be amended to enable an authorised officer to require the driver of a heavy vehicle to produce his or her driver's licence where the driver is required to carry the driver's licence under another law.

4 Powers of entry, inspection, search and seizure

Key points

- The HVNL powers of entry, inspection, search and seizure vary according to the purpose of entry, the location being entered and the means of entry.
- Stakeholders' views diverge on the need to simplify the powers. Some stakeholders consider closer alignment with the model WHS Act is required. Others consider that the current approach supplemented by operational guidance is a good balance between effective enforcement and human rights.
- This part also proposes two amendments to address gaps in the law identified by stakeholders that create inefficiencies or risks to safety.

The powers to enter a place or vehicle to inspect or search, and to seize property as evidence of alleged offences, are essential to law enforcement. These powers enable compliance to be monitored, and suspected contraventions to be investigated. Entering private property to inspect or search and possibly take property away are invasive actions, and to protect human rights the powers are specified clearly in the law so that they are transparent and proportionate to the situation and the seriousness of the suspected offence.

The HVNL provides authorised officers with a range of powers to enter, inspect, search and seize. The powers vary depending on the circumstances.

This part examines whether the powers need to be simplified, for example, in line with the approach under the model WHS Act; and whether two existing powers of the HVNL need to be specifically amended to:

- allow authorised officers to attend an incident where a death or personal injury has occurred (section 499 and section 521 of the HVNL)
- require a fleet or class of vehicles to be presented for inspection (section 522 of the HVNL)

This part also discusses four associated issues raised by stakeholders in response to the discussion paper, including a proposal to allow authorised officers to notify operators or employers about HVNL driver offences.

4.1 Existing legal framework

As the discussion paper notes, there are many HVNL powers of entry, search, inspection and seizure, with specific provisions detailing where each power can be exercised and for what purpose. These distinctions in powers ensure there is clarity as to when the power may be exercised and ensure a balance between effective enforcement to meet the objects of the HVNL, and protection of the human rights of the persons affected.

However, comparing the HVNL and WHS entry, search and seizure provisions, shows the provisions of the HVNL are significantly more numerous and complex.

4.2 Is there a need to simplify the HVNL powers of entry, search and seizure?

As noted earlier, enforcement agencies are concerned about the complexity of the existing HVNL powers of entry, search and seizure. To address this issue, TfNSW has suggested that the HVNL powers should be simplified by adopting the provisions of the model WHS Act with some modifications if necessary to address the specific circumstances of the heavy vehicle industry.

Taking this suggestion into account, the discussion paper identified three options:

Option 1: Simplify the HVNL entry, inspection, search and seizure powers using the model WHS Act provisions as a model (i.e. repeal of the existing HVNL powers of entry, search

and seizure and replace with provisions mirroring the model WHS Act powers of entry, search and seizure.

Option 2: Make changes to the HVNL entry, inspection, search and seizure powers on a provision by provision basis as evidence of issues are provided by stakeholders.

Option 3: Use operational guidance and training to address complexities.

Discussion paper proposal

The discussion paper proposed that option 2 and option 3 be adopted, ensuring that the HVNL continues to operate as intended and appropriately balances the interests of industry and enforcement agencies.

Stakeholder feedback

Stakeholders are divided on whether the HVNL entry, inspection, search and seizure powers require simplification using the model WHS Act provisions as a model or whether complexities can be addressed on a provision by provision basis and through the development of operational guidance and training.

DEDJTR, TMR, DJCS, Victoria Police and ALC support options 2 and/or 3, that is, minimal change to the law at this time. These stakeholders are concerned that adopting a WHS approach and tailoring it to the HVNL may result in additional complexities. In particular, TMR is concerned that using the model WHS Act provisions as a model is unlikely to reduce complexity.

A recent analysis by the NTC confirms that a number of changes would need to be made that may result in new complexities. For example, under the model WHS Act powers, the search and entry powers apply only for a 'workplace' (which includes a vehicle). If the WHS powers were adopted, an alternative concept would need to be developed to enable entry and search of places the HVNL currently allows for, such as 'place of business' and 'relevant place' (driver base, garage address, place where records required to be kept are held). Another example is that the model WHS Act does not have a power to stop a vehicle to allow other powers to be exercised.

In contrast, TfNSW, NHVR, SARTA, ALRTA, ATA and CCAA support simplification of the HVNL entry, inspection, search and seizure powers using the WHS approach. These stakeholders are concerned that the discussion paper's proposed approach would be piecemeal. Instead TfNSW considers that changes more consistent with WHS law would make the HVNL easier to interpret and enforce.

Similarly, the ATA is of the view that the:

Model WHS Act powers would cover all of the situations that the current HVNL powers address and the simplicity and familiarity of the powers would advantage both authorised officers and responsible persons.

This position is supported by the NHVR who considers that the discussion paper's proposed approach:

will introduce considerable and expensive costs, and result in a lengthy process of legislative change.

SA Police was also of this view, noting the discussion paper proposal:

has the potential to add further complexity.

Conclusions

Given the divergence of stakeholder views, the NTC notes that at this time there is no consensus about the need to simplify the HVNL entry, inspection, search and seizure powers. In addition, the NTC notes that adopting and adapting the model WHS Act provisions without further careful consideration, may merely replace one set of complexities with another.

Accordingly, the NTC recommends that, at this time, operational guidance and training be used to address any complexities, and the HVNL entry, inspection, search and seizure powers be amended on a provision by provision basis as evidence of issues are provided by stakeholders.

However as discussed further in part 8, reducing complexity and ensuring greater alignment between the HVNL and model WHS Act is supported, at least in principle, by all stakeholders. As discussed in part 8, the NTC proposes that there be a comprehensive review of the HVNL. The review would include whether any amendments are required to more closely align the HVNL with WHS laws including particular consideration of whether there is a need to simplify powers of entry search and seizure.

Recommendation 7

Note that, subject to recommendation 16, and the specific amendments noted in these recommendations, any further changes to the HVNL entry, inspection, search and seizure powers be made on a provision by provision basis as evidence of issues are provided by stakeholders, and that operational guidance and training also be developed to address complexities.

4.3 Is there a need to limit authorised officer powers where injury or death?

Section 499 of the HVNL empowers authorised officer who are police to enter any place without consent or a warrant if the officer reasonably believes:

- an incident involving death, injury or damage to property involves or may have involved a heavy vehicle, and
- the incident may have involved an offence against the HVNL, and
- there is a connection between the place and the heavy vehicle, and
- evidence of the heavy vehicle offence may be concealed or destroyed unless the place is immediately entered and searched.

Section 521 of the HVNL provides an authorised officer with the power to enter and search a vehicle for investigation purposes, using such necessary and reasonable help and force, if an authorised officer reasonably believes:

- the vehicle is being, or has been, used to commit an offence against the HVNL; or
- the vehicle, or a thing in the vehicle, may provide evidence of an offence against the HVNL; or
- the vehicle has or may have been involved in an incident involving death, injury or damage to property.

Except in NSW, only authorised officers who are police officers can exercise the powers in section 521 of the HVNL for an incident that involves death or injury to a person.

Enforcement agencies have suggested amendments to one or both sections are required because of concerns that:

- particularly in remote areas, police officers may not always be available to attend heavy vehicle crash scenes and authorised officers who are not police officers may be first on the scene but may be unable to act
- as a consequence of these provisions, the investigation of HVNL offences may be delayed until after police have concluded their investigations, even though the injuries sustained may not be serious.

To address these issues the discussion paper identified three options:

Option 1: Amend sections 499 and 521 of the HVNL to allow authorised officers who are not police officers to enter a place or a vehicle once police give permission.

Option 2: Amend section 521 of the HVNL only to allow authorised officers who are not police officers to enter a vehicle once police give permission.

Option 3: Develop operational guidance to assist authorised officers and police in applying section 521 of the HVNL

Discussion paper proposal

The discussion paper proposed that option 2 and option 3 be adopted on the basis this approach would provide for entry to vehicles in situations where police may not be available to attend; and would reduce the risk of unintended interference with a crime scene and assist gathering of evidence of HVNL offences.

Stakeholder feedback

Most stakeholders support the amendment of section 521 of the HVNL to allow authorised officers who are not police officers to enter a vehicle once police give permission, and developing operational guidance. However, a number of stakeholders raised concerns with the working of the proposal.

For example, DEDJTR is concerned that the:

expression 'once police give permission' will mean that an authorise officer who is not a police officer must seek police permission to enter a vehicle on a case-by-case, vehicle-by-vehicle basis.

Likewise, although TMR supports the proposal in principle, it recommends that:

any amendment be framed in terms of operating 'as direction by police' rather than 'with permission.

Similarly, Victoria Police suggests that:

the wording of the proposal be amended to be 'under police delegation' as this would be more appropriate and practical than 'once police give permission.

In contrast, the NHVR and TfNSW do not support any of the options. The NHVR instead suggests a fourth option being to remove the restriction on authorised officers who are not police officers in both sections, as this would:

enable appropriate lawful action to be undertaken without inadvertently jeopardising admissibility of evidence gathered, ensure there were no delays in securing evidence, would not rely upon police presence (especially where questions of availability might exist), and would reduce the training and guidance costs in implementation.

TfNSW considers option 1 is the least unsuitable option, but considers cooperation with police is an operational matter that should not be specified in the HVNL, and would therefore prefer amending both sections 499 and 521 to allow authorised officers who are not police officers to enter a place or a vehicle, without reference to police permission. TfNSW considers that:

The proposed options fail to take account of the nature of the general duty to be introduced into the HVNL. Under the general duty, a category 1 offence will have been committed where a duty holder fails to address a risk of death or serious injury or illness. Under this approach, death or serious injury or illness may be evidence of a category 1 offence.

Conclusions

Having regard to the stakeholder feedback received, the NTC considers that section 521 of the HVNL should be amended to allow authorised officers who are not police officers to enter a vehicle once directed or authorised to do so by police and that supporting operational guidance also be developed.

In the NTC's view such an approach will address the identified problem involving access to heavy vehicle crashes in remote areas; reduce the risk of unintended interference with a crime scene; and assist gathering of evidence of HVNL offences.

The NTC recognises it will need to work closely with enforcement agencies and road transport agencies during the development of the amendments to ensure the mechanism is suitable for all state and territory police operations.

Recommendation 8

That section 521 of the HVNL, concerning the power to enter and search a heavy vehicle involved or suspected to be involved in an offence etc, be amended to allow authorised officers who are not police officers to enter a vehicle once directed or authorised to do so by police; and that operational guidance also be developed to assist authorised officers and police in applying section 521 of the HVNL.

4.4 Is a broader power to require heavy vehicle inspection necessary?

Section 522 of the HVNL empowers authorised officers to require a heavy vehicle to be produced for inspection if the officer reasonably believes:

- the heavy vehicle has been used on a road in the preceding 30 days or will be used on a road, and
- the driver has not complied with the HVNL in driving the vehicle, or the vehicle does not comply with the HVNL, or is defective.

The NHVR suggested that section 522 of the HVNL should be amended to enable authorised officers to require a fleet or class of vehicles to be produced for inspection. The NHVR considered that this is currently not possible under the HVNL because an authorised officer must first see each individual vehicle in order to form a reasonable belief that the vehicle needs to be inspected. The NHVR also proposed that the timeframe in which an authorised officer believes the vehicle was used on a road be extended from the current 30 days to, for example, 60 days.

The discussion paper set out three options to address this issue:

Option 1: Amend section 522 to allow an authorised officer to require a heavy vehicle to be produced for inspection if the officer reasonably believes it has been used on a road in the preceding 60 days, rather than the current 30 days.

Option 2: Amend section 522 to ensure that a fleet or class of vehicles can be required to be produced without each vehicle having been seen by an authorised officer, that is, the authorised officer can form a reasonable belief that a vehicle does not comply with the HVNL or is defective without having seen the vehicle.

Option 3: No change.

Discussion paper proposal

The discussion paper proposed that option 1 and option 2 be adopted to provide authorised officers with appropriate power to deal with known safety issues affecting a larger group of vehicles.

Stakeholder feedback

There is general support for amending section 522 to change the 30 day limit to 60 days and to ensure that a fleet or class of vehicles can be required to be produced without having been seen by an authorised officer. The majority of stakeholders consider that this amendment will increase flexibility for compliance staff and improve the ability to respond to known safety issues and address systemic failures. However, NatRoad, CCAA and VTA oppose both these changes, and DJCS considers it is unnecessary to extend the day limit to 60 days. The major concern for the industry stakeholders is the negative business impact of requiring a fleet of vehicles to be presented for inspection.

In support of the change, the NHVR considers that:

this issue is essential to effectively deliver safety outcomes and the objects of the law by increasing the ability to respond to known or emerging safety issues and address systemic failures in vehicle standards.

TfNSW is of the view that this amendment would:

increase flexibility for compliance staff which potentially improves safety outcomes.

DPTI considers that the amendment could be:

important especially where a high percentage of inspected vehicles have shown to be un-roadworthy.

Although the ALRTA supports the proposals it suggests that:

in recognition that the exercise of these provisions could have very serious operational impacts and costs for affected transport businesses, that only senior and appropriately trained authorised officers should be empowered to require inspections of a fleet or class of vehicles without first having been seen by an authorised officer, and affected operators must have a right of internal review and appeal of any such decision.

In contrast, NatRoad, CCAA and VTA do not support the proposal. VTA considered:

that it could unnecessarily and significantly impact an operator's business.

In NatRoad's view the proposal 'advances what is equivalent to a product recall. This recall would be costly for operators.'

Conclusions

Having regard to the stakeholder feedback received, the NTC considers that section 522 of the HVNL should be amended to allow an authorised officer to require a heavy vehicle to be produced for inspection if the officer reasonably believes it has been used on a road in the preceding 60 days, rather than the current 30 days; and to ensure that a fleet or class of vehicles can be required to be produced without having been seen by an authorised officer.

The NTC considers that these amendments will provide authorised officers with appropriate power to deal with known safety issues affecting a larger group of vehicles.

The NTC accepts ALRTA's suggestion of restricting the power for an authorised officer to require a fleet of vehicles to be presented for inspection to more senior officers. The NTC recognises the potential costs to an operator could be significant. Accordingly the NTC considers the amendment should refer to a prescribed class of authorised officer.

Recommendation 9

That section 522 of the HVNL, concerning the power to order the presentation of heavy vehicles for inspection, be amended to:

(a) apply to heavy vehicles the officer reasonably believes has within the preceding 60 days been used or will be used on a road, and

(b) enable a prescribed class of authorised officer to require a fleet or class of vehicles to be presented for inspection where the authorised officer has a reasonable belief that the fleet or class of vehicles does not comply with the HVNL or is defective.

4.5 Associated issues raised by stakeholders

Employers provided with details of driver offences

During the discussion paper stakeholder information sessions the NHVR, ALRTA, SARTA and DPTI noted that a driver may commit HVNL offences while driving a heavy vehicle without the vehicle's operator becoming aware of them. These stakeholders suggest that such driver breaches may impact on a company's CoR compliance. Accordingly, these stakeholders suggested that similarly to South Australia, authorised officers should have the discretion to notify operators of a driver's breach.

South Australia currently has a provision that allows reporting of serious road safety offences in regulation 98(7A) of the *Motor Vehicle Regulations 2010* (SA).

The ALRTA is of the view that disclosure should be mandatory rather than discretionary, stating that:

timely knowledge about HVNL offences committed by drivers is so absolutely essential for transport operators to manage any risks posed by individual drivers, that the HVNL should compel all authorised officers to advise the registered owner of the heavy vehicle.

TMR supports the proposal on the grounds that it can improve road safety through assisting operators with their CoR responsibilities and improving compliance by allowing them to quickly address issues. However, TMR:

has concerns with the privacy implications, and suggests limitations would need to be placed around the types of offences and the circumstances under which the offences would be reported to the owner or operator. Suitable oversight, checks and balances would need to be in place to ensure that this power would be used appropriately.

Similarly to South Australia, such a proposal would require jurisdictions to amend their own applicable laws.

The NHVR has suggested amendment to the HVNL is also necessary so that the authorised officer does not breach section 727 of the HVNL concerning protected information.

Search power should relate to both a vehicle and a person

Victoria Police and DEDJTR have concerns that the powers to search and inspect a heavy vehicle are restricted to the vehicle and documents and things related to the vehicle. There is concern that the construction of the provisions prevents the use of the powers in relation to the driver. Victoria Police considers that currently:

if offences in a driver's work diary relate to a different vehicle, authorised officers are unable to search the current vehicle being used by the driver.

Accordingly, Victoria Police recommends amendment to the HVNL to remedy this situation.

AOs who are not police should be authorised to use force to break a seal or lock

Victoria Police and DEDJTR suggest that authorised officers who are not police should be authorised to use force to break a seal or a lock and reseal it. DEDJTR recommends amending the HVNL:

to require authorised officers who break seals when conducting searches of heavy vehicles to reseal the thing or, if the officer does not have a seal available, to leave an auditable account of their actions.

Amend section 568 so police using police powers to stop a heavy vehicle are not excluded from exercising the powers to require a driver to produce documents

QPS is concerned that the power in section 568 of the HVNL to require a driver to provide an authorised officer relevant documents in his or her possession may not apply where a vehicle is stopped by police using police powers. This concern arises because section 568 applies when the vehicle 'has been stopped under section 513'. QPS suggests the section may be simplified by the inclusion of a new sub section (d) with wording to the effect 'has been stopped under other legislation' to avoid any argument that police are not entitled to demand the documents covered by section 568.

Conclusions

Knowledge of driver breaches could assist CoR parties to comply with their CoR obligations, which is particularly important with the introduction of the positive primary duty on CoR parties. However, there are human rights considerations about the notification of alleged offences to third parties. The NTC considers there has been insufficient time to consider the advantages and disadvantages of the proposal and considers that this issue should be either referred to the NTC's HVNL Maintenance Group for detailed consideration and consultation or alternatively, if significant policy matters are raised, be considered as part of the proposed further review of the HVNL.

Victoria Police and DEDJTR propose an amendment to the heavy vehicle inspection and search powers to allow a vehicle to be searched where a document or thing in the vehicle relates to

another vehicle. The NTC considers there has been insufficient time to consider the advantages and disadvantages of this proposal and considers that this issue should be either raised with the NTC's HVNL Maintenance Group for more detailed consideration and consultation or alternatively, if significant policy matters are raised, be considered as part of the proposed further review of the HVNL.

Victoria Police and DEDJTR propose an amendment to the HVNL powers to search heavy vehicles to ensure an authorised officer has the power to break a seal and to reseal it, and in particular to require an authorised officer to reseal a broken seal or leave an auditable trail. The NTC considers authorised officers have the power to break a seal under section 521 of the HVNL which provides for use of 'necessary and reasonable' force. This issue has also been considered by the NTC in other reviews. However, given Victoria Police and DEDJTR's concerns, the NTC is of the view this issue should be further considered through the NTC's HVNL Maintenance Group, in particular the question of whether an amendment to the HVNL is required or whether the issue can be addressed through the development of operational guidance.

QPS suggests an amendment to section 568 of the HVNL to ensure that police using police powers to stop a heavy vehicle can require the driver to produce the documents covered by that section. The NTC considers this proposal is specific to the interaction of the powers in the HVNL and those in the *Police Powers and Responsibilities Act 2000* (Qld). In the NTC's view this is a technical issue and should be raised with the NTC's HVNL Maintenance Group for more detailed consideration and consultation with stakeholders.

5 Available sanctions and the need for additional remedies

Key points

- The HVNL currently provides the courts and authorised officers with a range of measures to address regulatory non-compliance.
- Stakeholder feedback supports the introduction of two additional enforcement measures, court injunctions and authorised officer prohibition notices

The HVNL currently provides authorised officers and the courts with a range of measures to address regulatory non-compliance such as formal warnings, improvement notices, prohibition notices and supervisory intervention orders. By providing these measures, the HVNL recognises that different compliance and enforcement tools are needed to regulate entities with diverse operations, objectives and compliance capabilities. Equally, different tools may be needed to manage different forms and degrees of non-compliance.

The model WHS Act likewise provides for the use of various compliance and enforcement measures to assist officers to secure effective compliance with, and enforcement of, WHS legislation.

5.1 Existing legal framework

The table below lists the compliance and enforcement measures available under both the HVNL and the model WHS Act, and identifies whether the power is exercisable by authorised officers or the courts.

	Authorised officer orders - HVNL	Authorised officer order - model WHS Act	Court order - HVNL	Court power - model WHS Act
Improvement notices	YES	YES	NO	NO
Prohibition notices	NO	YES	NO	NO
Prohibition orders	NO	NO	YES	NO
Embargo notices	YES	NO	NO	NO
Non-disturbance notices	NO	YES	NO	NO
Infringement notices	YES	YES	NO	NO
Formal warnings	YES	NO	NO	NO
Adverse publicity orders	NO	NO	NO	YES
Restoration orders	NO	NO	NO	YES
Injunctions	NO	NO	NO	YES
Enforceable undertakings	YES (introduced as part of 2016 HVNL Amendment Act)	YES (Regulator issued)	NO	NO
Commercial benefits orders	NO	NO	YES	NO
Cancellation or suspension of vehicle registration	NO	NO	YES	NO
Supervisory intervention order	NO	NO	YES	NO
WHS project orders & training orders	NO	NO	NO	NO
Compensation orders	NO	NO	YES	NO

5.2 Is there a need for the HVNL to be amended to include additional sanctions?

As noted in the discussion paper, a number of enforcement and road transport agency stakeholders consider that the HVNL may benefit from the inclusion of additional sanctions similar to those included in the model WHS Act so as to provide the NHVR and enforcement agencies with greater flexibility, particularly in circumstances where a monetary penalty might be considered inappropriate to induce compliance.

The discussion paper identified four options:

Option 1: Amend the HVNL to enable authorised officers to issue prohibition notices.

Option 2: Amend the HVNL to enable authorised officers to issue formal cautions.

Option 3: Amend the HVNL to enable the courts to issue injunctions:

- compelling a person to comply with a notice issued by authorised officers (similar to section 215 of the model WHS Act) and/or
- requiring a person to cease contravention of the HVNL (similar to section 240 of the model WHS Act).

Option 4: Amend the HVNL to enable the court to make an adverse publicity order (similar to sections 234 and 236 of the model WHS Act).

Discussion paper proposal

The discussion paper proposed option 3 be adopted on the basis this option would provide a timely means to ensure that breaches of notices under the HVNL are addressed.

Stakeholder feedback

Road transport agency, enforcement agency and industry stakeholders all support the discussion paper's proposal to amend the HVNL to enable court-issued injunctions.

In addition, there was also support from DEDJTR, TfNSW, Victoria Police and the NHVR for enabling authorised officers to issue prohibition notices.

In support of enabling courts to issue injunctions, TfNSW considers:

such an amendment will assist in both the efficiency and effectiveness of the regulator's operations.

NatRoad also supports this option:

as it is based on introducing features of the model WHS laws that reinforce the risk-based model.

The ATA supports the option stating that:

this additional power would most likely be used in extreme situations involving a brazen and serious breach of a notice or HVNL obligation.

Stakeholders supporting these options consider they would motivate compliance and provide further avenue to address immediate safety risks.

TfNSW, and DEDJTR and the NHVR for similar reasons, supports the introduction of an authorised officer issued prohibition notice as this would:

enable an authorised officer to immediately prevent ongoing offending, systematic failures, or severe risks to safety caused by a particular activity.

However authorised officer issued prohibition notices are not supported by the ATA.

There was no support for formal cautions. Only DEDJTR gave in principle support for adverse publicity orders.

Conclusions

The NTC considers that the HVNL should be amended to enable the courts to issue injunctions similar to sections 215 and 240 of the model WHS Act.

Based on the stakeholder feedback received, the NTC is also of the view that the HVNL should also be amended to enable authorised officers to issue prohibition notices similar to section 195 of the model WHS Act. In the NTC's view the benefit of a power for immediate intervention to address a serious risk outweighs the disadvantage of the potential disruption to a road transport business. This amendment will also increase consistency between the HVNL and the model WHS Act.

Recommendation 10

That Chapter 10 of the HVNL be amended to:

(a) empower authorised officers to issue prohibition notices prohibiting the carrying on of the activity or the carrying on of the activity in a specified way, until the authorised officer is satisfied that the matters giving rise to the risk have been remedied (similar to section 195 of the model WHS Act), and

(b) enable the courts to issue injunctions:

(i) compelling a person to comply with a notice, or restraining a person from contravening a notice issued by an authorised officer (similar to section 215 of the model WHS Act), and/or

(ii) requiring a person to cease contravention of the HVNL (similar to section 240 of the model WHS Act).

That training and guidance be developed for authorised officers in the use of prohibition notices.

5.3 Is there a need to publish enforcement action outcomes?

Publicising the outcomes of prosecutions and court-imposed sanctions can give comfort to compliant operators that non-compliant parties are being dealt with by enforcement agencies and provide lessons to industry on key risks. A previous survey undertaken by the NTC suggested that industry wants to know about prosecution outcomes and considers such publication tangible evidence of the impact of the CoR reforms.

Currently, NSW is the only jurisdiction to publish statistics of enforcement actions, including actions taken against CoR parties.

Discussion paper proposal

The discussion paper proposed that the NHVR be required to publish court outcomes including penalties imposed through either administrative processes or amendment to the HVNL.

Stakeholder feedback

The majority of road agency, enforcement agency and industry stakeholders support the proposal to publish the outcomes of prosecutions and court-imposed sanctions.

For TfNSW:

the benefits include both carrot (gives comfort to compliant operators) and stick (adverse publicity for non-compliant operators) outcomes.

The NHVR also has a similar view.

The ATA and NatRoad also support the publication of court outcomes, with the ATA stating:

it is in the interests of the industry for there to be accurate information available about court outcomes, enforceable undertakings and especially the persons subject to prohibition orders.

However, several stakeholders cautioned the need to ensure that any publication be deferred until after any relevant review/appeal periods have passed and that any system does not create an unnecessary administrative burden to supply or correlate information. DPTI also cautioned that the

publication of court outcomes should not lead to the positive safety outcomes achieved through other sanctions, such as improvement notices, being over-looked as educative tools.

SA Police did not support the discussion paper proposal, considering it an administrative burden on enforcement agencies collecting and providing information to the NHVR. The administrative burden of such a requirement was also a concern of the NHVR and DPTI as well.

Conclusions

Based on stakeholder feedback received, the NTC considers that the HVNL should be amended to enable the NHVR to publish court outcomes including penalties imposed. The NTC considers that this option would help raise awareness of heavy vehicle breaches and may lead to changes to non-compliant behaviour.

The NTC considers a legislative amendment is preferable to administrative processes. This will provide the NHVR with certainty and authority in obtaining information from other agencies.

Recommendation 11

That the HVNL be amended to enable the NHVR to publish court outcomes including penalties imposed.

6 Evidentiary issues

Key points

- The admissibility of evidence is key to successful prosecutions.
- There is some stakeholder support for an evidentiary provision that would clarify that evidence obtained legally by police is not inadmissible solely on the grounds that it was not obtained using HVNL powers. Other stakeholders consider guidance material and training could resolve any problems.
- There is little support for a stand-alone evidentiary aid relating to vehicle standards breaches for speed-regulated heavy vehicles detected at travelling at or above 115km/h .

This part considers evidentiary issues in two different contexts:

- admissibility of evidence of HVNL offences obtained using state and territory police powers, that is, the admissibility of evidence obtained not using the powers of the HVNL
- a proposal to introduce a stand-alone evidentiary provision relating to vehicle standards breaches for heavy vehicles detected travelling at or above 115 km/h.

6.1 Is there a need to clarify the admissibility of evidence obtained using police powers?

The regulatory impact statement for the original HVNL noted that the law was not intended to operate to the exclusion of existing police powers:

...it is unrealistic to expect that police powers be absorbed within the HVNL. The police remain responsible for enforcing all traffic laws, not simply those relevant to heavy vehicles or captured within the HVNL. Therefore, police powers are extraneous to the 'authorised officer' provisions of the HVNL. The police will be captured under each jurisdiction's state-based application act.

In this context, section 5 of the HVNL expressly provides that, where declared by a law of a participating jurisdiction, police may be authorised officers for the purposes of the HVNL.

However the admissibility of evidence, including evidence gathered under the exercise of police powers, is governed by the evidence laws of each jurisdiction.

Whether evidence gathered by police in an investigation of a non-HVNL offence is admissible as evidence of an offence against the HVNL, and whether evidence gathered by police using non-HVNL powers in an investigation of a HVNL offence is admissible, are questions for the courts in each jurisdiction. It depends on the offence, the circumstances of the offence and how the evidence was obtained. Some stakeholders maintain that this causes uncertainty and may result in evidence being ruled inadmissible solely because it was gained using police powers.

Stakeholders have suggested two alternatives to address potential uncertainty regarding the powers that police and HVNL authorised officers can use, and the admissibility of evidence obtained using police powers, in enforcing the HVNL.

Option 1: Amend the HVNL to include a provision clarifying that evidence lawfully obtained using police powers is admissible as evidence in proceeding for an offence under the HVNL.

Option 2: That the NHVR develop operational guidance and training clarifying the evidentiary status of evidence lawfully obtained using police powers.

Discussion paper proposal

The discussion paper proposed option 2 be adopted as an administrative means to minimise the risk of incorrect powers being used.

Stakeholder feedback

Stakeholders are divided on the need to clarify the admissibility of evidence obtained using police powers. The majority of road transport agencies, enforcement agencies and industry stakeholders

consider that admissibility of evidence is a matter for the courts, and that no facilitative provision is required regarding the admissibility of evidence gathered using police powers rather than HVNL powers. However, DJCS, NHVR and ALRTA are of the view that guidelines would not be considered by courts but a facilitative provision could be brought to the court's attention and reduce the risk of evidence being ruled inadmissible solely because it was gained using police powers.

In support of the development of protocols to clarify the interaction of police and HVNL powers, TMR notes:

courts have an over-riding discretion as to the admissibility of evidence and the weight given to the evidence.

NatRoad supports this option and clarifying exactly what HVNL authorised officers who are police and HVNL authorised officers who are not police can do. In NatRoad's view:

a document of that kind would assist all industry participants.

In support of amending the HVNL, ALRTA is of the view that:

the nature of the Australian Federated legal system can sometimes undermine nationally consistent outcomes – even when the provisions of the HVNL in each state are essentially the same.

Likewise, the NHVR supports changing the law and comments that relying on operational guidelines:

fails to recognise the simplicity, yet highly important benefits, of a statutory provision that acknowledges that admissibility of the evidence irrespective of which power may be used to gather it.

Conclusions

Having regard to the stakeholder feedback received, in particular from the NHVR, the NTC is of the view that the HVNL should be amended to include a provision clarifying that evidence lawfully obtained using police powers is not inadmissible in proceedings for an offence. The NTC considers that such an amendment would be for clarification purposes and the avoidance of doubt. In addition, it is considered that this amendment would ensure greater legislative clarity and certainty and improve the effectiveness of prosecution efforts without removing court discretion.

In addition, the NTC considers that the NHVR should develop supporting operational guidance and training to clarify the use of evidence lawfully obtained using police powers. The guidance would be developed in consultation with police and focus on the use of this evidence in prosecutions undertaken by the NHVR.

Recommendation 12

- (a) That the HVNL be amended to include a provision clarifying that evidence gathered lawfully using police powers is not inadmissible as evidence in the prosecution of an offence under the HVNL on the grounds that police powers were used to obtain that evidence rather than powers under the HVNL.*
- (b) That the NHVR in consultation with police forces develop operational guidance and training to clarify the use of evidence lawfully obtained using police powers in HVNL prosecutions*

6.2 Is there a need for a speed limiter deemed non-compliance evidentiary provision?

A properly functioning speed limiter is an important risk-mitigation measure for ensuring public safety by protecting the community against the significant risks associated with heavy vehicle speeding.

Speed limiters are devices that limit the maximum speed of a vehicle. All heavy vehicles of more than 12 tonnes gross vehicle mass (GVM) and all buses more than 5 tonnes GVM are required to be fitted with a speed limiter that is set to 100 km/h. States and territories have also regulated

speed limiter settings for other vehicles classes; for example, road trains are speed-limited to 90 km/h in South Australia and the Northern Territory.

In early 2016 the NTC conducted a review, including the release of a discussion paper, to assess two proposals to strengthen the speed compliance provisions of the HVNL:

- an evidentiary provision that deems a speed limiter non-compliant if a heavy vehicle is detected travelling at or above 115 km/h (proposal 1)
- a power to immediately ground heavy vehicles travelling 15 km/h or more over posted or default speed limits (proposal 2).

Based on the stakeholder submissions received; the NTC recommended no changes be made to the HVNL.

However, having regard to the concerns raised by jurisdiction enforcement agencies, and TfNSW, the NTC agreed to a more specific proposal being further considered as part of this review of investigative and enforcement powers.

Accordingly the discussion paper set out two options:

Option 1: A stand-alone evidentiary provision relating to vehicle standards breaches for speed-regulated heavy vehicles detected at travelling at or above 115km/h.

Option 2: No change to the law.

Discussion paper proposal

The discussion paper proposed option 2 be adopted on the basis that option 1 would not be consistent with the positive duties approach taken under the 2016 CoR Reforms.

Stakeholder feedback

The majority of road transport agencies, enforcement agencies and industry stakeholders agree with the NTC's assessment in the discussion paper and support there being no change made to the law.

For DEDJTR:

the introduction of a deeming evidentiary provision proposed in option 1 would be inconsistent with the positive duties approach being implemented under the agreed chain of responsibility reforms.

Similarly NatRoad considers a deeming provision to be:

at odds with the move to an outcomes based approach to managing safety risks' and that deeming of the kind discussed is unnecessary and introduces complexities rather than remove them.

This position is also supported by TMR who considers that:

the proposed changes to section 522 under proposal 7 (enabling the production of considered a fleet or class of vehicles) 'will assist in the management of speed limiter issues and that any evidentiary provision is therefore not required.

However, TfNSW maintains:

a stand-alone evidentiary provision would offer enforcement benefits as it would assume non-compliance of the speed limiter based on the vehicle travelling at excessive speeds.

It is noted that NSW legislation already contains a deeming provision. Option 1 is also supported by NSW Police. DJCS also supports of option 1, suggesting a modification of the provision, such that it would only apply on level or uphill ground.

Conclusions

Given the lack of stakeholder support and the absence of any new evidence being provided in response to the discussion paper, the NTC is of the view that no amendment should be made to

the HVNL to include a stand-alone evidentiary provision relating to vehicle standards breaches for speed-regulated heavy vehicles detected at travelling at or above 115km/h.

Recommendation 13

That a stand-alone evidentiary provision relating to vehicle standards breaches for speed-regulated heavy vehicles detected at travelling at or above 115km/h not be included in the HVNL.

7 Cross-jurisdictional issues

Key points

- To ensure the objects of the HVNL can be realised and the NHVR can perform its functions it is important that HVNL breaches can be investigated and prosecuted across state and territory borders.
- There is some stakeholder support for an evidentiary provision that would clarify that evidence obtained legally in one state or territory is not inadmissible in proceedings in a second state or territory solely on the grounds that it was not obtained in the second state or territory. Other stakeholders consider guidance material and training could resolve any problems.
- Most stakeholders consider that information exchange between the NHVR, police and road transport agencies can be managed using memoranda of understanding or other protocols.

The heavy vehicle industry operates nationally and offences may occur in different states and territories. Accordingly, the NHVR cannot function as a true national regulator without addressing cross-jurisdiction issues.

To ensure the objects of the HVNL can be realised it is important that breaches of the HVNL can be investigated and prosecuted across jurisdiction borders. The sharing of information between agencies for the purposes of the HVNL allows for a more comprehensive understanding of industry compliance practices across jurisdictions, including the identification of trends and national issues, and enables the development of better-targeted compliance strategies.

This part examines whether there is a need to clarify how cross-border offences are investigated and prosecuted, and how information is shared amongst jurisdictions and enforcement agencies.

7.1 Existing legal framework

Section 3 of the HVNL provides that the object of the law is to 'establish a national scheme for facilitating and regulating the use of heavy vehicles'.

Accordingly, section 4 of the HVNL sets out the regulatory framework by which the objects of the HVNL are to be achieved. A key pillar of this framework is the establishment of the NHVR.

Section 656 of the HVNL provides that 'it is the intention of the Parliament of this jurisdiction that this Law as applied by an Act of this jurisdiction, together with this Law as applied by Acts of other participating jurisdictions, has the effect that the NHVR is one single national entity, with functions conferred by this Law as so applied.' Section 656 of the HVNL provides that the NHVR has the power to 'do acts in or in relation to this jurisdiction in the exercise of a function expressed to be conferred on it by this Law as applied by Acts of each participating jurisdiction'.

Section 659 of the HVNL details the functions of the NHVR. These functions include:

- monitoring compliance
- investigating contraventions or possible contraventions, including offences
- bringing and conducting proceedings in relation to contraventions or possible contraventions, including offences
- working collaboratively with other law enforcement agencies to ensure a nationally consistent approach for enforcing contraventions of laws involving heavy vehicles
- working collaboratively with road managers, the NTC and industry to ensure a wide understanding of the HVNL, and to encourage participation in achieving the objects of the HVNL.

In addition, section 16 of the HVNL provides that:

It is the intention of the Parliament of this jurisdiction that the operation of this Law is, as far as possible, to include operation in relation to the following:

- (a) things situated in or outside the territorial limits of this jurisdiction;

(b) acts, transactions and matters done, entered into or occurring in or outside the territorial limits of this jurisdiction;

(c) things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would, apart from this Law, be governed or otherwise affected by the law of another jurisdiction.

The effect of section 16 of the HVNL is to displace the presumption that the HVNL is limited by state and territory borders. Taken together, the effect of sections 3, 4, 16, 656 and 659 of the HVNL is that the HVNL and its enforcement, including the investigation and prosecution of cross-border offences, is to be a seamless national arrangement (within the participating jurisdictions).

7.2 Is there a need to clarify how cross-border offences are investigated and prosecuted?

As noted in the discussion paper, enforcement agencies have concerns about the cross-jurisdiction application and enforcement of the HVNL. In particular, there is concern about the use of evidence and the recognition of authorised officers, where these officers are appointed under the application laws of one participating jurisdiction and wish to exercise HVNL powers in another participating jurisdiction.

To address these concerns the discussion paper set out three options.

Option 1: That the HVNL be amended to include a provision enabling the extension of offences where there is geographical nexus.

Option 2: That the HVNL be amended to include a provision clarifying the admissibility of evidence lawfully gathered in one jurisdiction for use in a prosecution in another jurisdiction.

Option 3: That the NHVR develop operational guidance material and protocols to clarify cross-border investigations and prosecutions.

Discussion paper proposal

The discussion paper proposed option 3 be adopted on the basis that operational guidance material and protocols would be sufficient to assist authorised officers in investigating and prosecuting cross-border offences.

Stakeholder feedback

The majority of road transport agencies, enforcement agencies and industry stakeholders support the proposal to develop operational guidance material and protocols to clarify cross-border investigations and prosecutions (option 3). NHVR, Victoria Police and ALRTA support including a provision in the HVNL clarifying the admissibility of evidence lawfully gathered in one jurisdiction for use in a prosecution in another jurisdiction (option 2). DEDJTR supports both options. These stakeholders consider that these options would assist enforcement action across state and territory borders and support national consistency. Only the NHVR supports option 1. NSW Police noted that NSW already has a provision about geographical nexus in its legislation.

NatRoad, ALRTA, CCAA and VTA support option 3, with NatRoad stating:

[it is] a step towards a truly national scheme and the need to have clarity around cross border investigations and prosecutions.

TMR considers:

Operational guidelines are required to ensure consistency of approach across jurisdictions.

TfNSW is of the view that:

such material should assist in providing clarity for authorised officers and assist in agency operations with both the NHVR and other jurisdictions.

In support of option 2, Victoria Police suggests that:

option 2 be adopted given that the law is intended to be 'national', and amending the HVNL to clarify the admissibility of evidence lawfully gathered in one jurisdiction for use in a prosecution in another jurisdiction is both logical and necessary.

Victoria Police also comments:

guidance material does not have the same influence as clear legislative provisions when undertaking prosecutions.

The NHVR supports option 1 and option 2. The NHVR considers that:

although it is clear that this is the intention of the legislation (i.e. the HVNL is intended to apply across borders), the practical reality is that as it is not explicit, it is an added burden that will lead to unnecessary appeals, which have the risk that the Courts will come to a different interpretation.

Two road transport agencies are of the view that there are additional issues around extraterritorial operation that need to be resolved. DEDJTR supports:

further clarification of the existing extraterritorial provisions of the HVNL to support cross-border investigation and prosecutions.

DPTI suggests a specific NHVR project or working group:

to investigate the problems being reported by both police and authorised officers in relation to investigating and prosecuting cross-border matters: This would provide a basis for making informed decisions about any necessary operational improvements, including the need for legislative change.

Conclusions

Having regard to the stakeholder feedback received, the NTC is of the view that the HVNL should be amended to include a provision clarifying that evidence lawfully gathered in one jurisdiction is not inadmissible in a prosecution in another jurisdiction. In addition, the NTC considers that the NHVR should also develop operational guidance material and protocols to clarify the use of evidence in cross-border investigations and prosecutions.

The NTC considers that such an amendment would be for clarification purposes and the avoidance of doubt. The NTC considers that these changes will assist in avoiding court argument about admissibility of evidence and help strengthen relationships between the NHVR and enforcement agencies in investigating and prosecuting cross-border offences.

The NTC notes the stakeholder feedback supporting further work on cross-border issues, in particular, DPTI's suggestion of establishing a project or working group involving police and road transport agencies to identify and clarify the enforcement issues and recommending operational improvements or legislative changes. The NTC suggests this is matter for further consideration by the NHVR.

Recommendation 14

(a) That the HVNL be amended to include a provision clarifying that evidence lawfully gathered in one jurisdiction is not inadmissible as evidence in the prosecution of an offence under the HVNL in another jurisdiction.

(b) That the NHVR develop operational guidance material and protocols to clarify the use of evidence in cross-border investigations and prosecutions.

7.3 Is there a need to clarify information-sharing arrangements between jurisdictions and enforcement agencies?

Section 660 of the HVNL provides that the NHVR may exercise any of its functions in cooperation with, or the assistance of, a participating jurisdiction or the Commonwealth, including in cooperation with or with the assistance of a government agency of a participating jurisdiction or of the

Commonwealth. In particular, section 660 of the HVNL empowers the NHVR to ask participating jurisdiction government agencies and the Commonwealth for information the NHVR requires to exercise its functions under the HVNL, and to use the information in exercise of NHVR functions under the HVNL. Section 660 of the HVNL also expressly provides that a government agency that receives a request for information under this section from the NHVR is authorised to give the information to the NHVR.

The exercise of these powers is also supported by information-sharing systems such as NEVDIS and CrimTrac, operated by the Australian Criminal Intelligence Commission.

However, as noted in the discussion paper, road transport and enforcement agencies are concerned that the HVNL should enable the sharing of information between road transport and enforcement agencies from different states and territories and the NHVR.

According to these stakeholders, in the absence of an enabling legislative provision or jurisdictional protocols on information sharing, road transport and enforcement agencies generally only investigate vehicles registered in their own jurisdiction, despite the fact such vehicles may not be the highest-risk offenders.

To address these concerns, the discussion paper identified three options:

Option 1: That the HVNL be amended to include a provision to allow for the disclosure of specified information between participating government agencies, the Commonwealth and the NHVR for the purposes of the HVNL.

Option 2: That the HVNL be amended to designate the NHVR as a law enforcement agency.

Option 3: That the NHVR develop Memoranda of Understanding or other protocols to facilitate the sharing of information for the purposes of the HVNL between enforcement agencies, road transport agencies and the NHVR.

Discussion paper proposal

The discussion paper proposed option 3 be adopted on the basis that this option will provide practical guidance and assistance to enforcement agencies in undertaking HVNL investigations.

Stakeholder feedback

Stakeholders are divided on how information-sharing arrangements between jurisdictions and enforcement agencies should be clarified.

DEDJTR, TMR, DIPL NT, TfNSW, Victoria Police, ALC, NatRoad, ATA and VTA all support the development of memoranda of understanding or other protocols to facilitate the sharing of information. However, these stakeholders caution that any such protocols will need to address relevant privacy legislation.

In contrast, DPTI, NHVR and SARTA are of the view that the HVNL should be amended to designate the NHVR as a law enforcement agency.

Conclusions

Having regard to the stakeholder feedback received, the NTC considers that there is insufficient support at this time for the HVNL to be amended to designate the NHVR as a law enforcement agency. The NTC is of the view that administrative mechanisms are adequate to address the issues and no evidence to justify a change to the law has been provided. The NTC supports the development of MOUs and other protocols to clarify the sharing of information between jurisdictions and enforcement agencies.

Recommendation 15

That the NHVR develop Memoranda of Understanding or other protocols to facilitate the sharing of information for the purposes of the HVNL between enforcement agencies, road transport agencies and the NHVR.

8 Aligning the HVNL with WHS

Key points

- A number of stakeholders see this review of HVNL investigative and enforcement powers as a unique opportunity to improve the law and to better align the law with other safety laws, particularly the model WHS Act.
- Other stakeholders agree in principle, but consider such changes are not necessary now, but should be considered as part of a broader review of the HVNL, including assessing the effectiveness of the CoR Reform amendments.

8.1 The CoR Reforms – a first step to more closely aligning the HVNL with the model WHS Act

The CoR Reforms align the HVNL more closely with the model WHS Act and other national transport safety laws by:

- reformulating the existing prescriptive obligations on current CoR parties as a primary duty to ensure, so far as is reasonably practicable, the safety of the party's transport activities, based on section 19 of the model WHS Act.
- adopting a hierarchy of penalties for breach of the primary duty that are significantly higher than penalties for other offences in the HVNL to indicate the importance of the primary duty, based on sections 31, 32 and 33 of the model WHS Act.
- adopting a set of principles for safety duties to guide duty holders, regulators and the courts on the application and interpretation of these duties, based on sections 14, 15 and 16 of the model WHS Act.
- reformulating the existing EOL offences as a positive due diligence obligation on executive officers, based on section 27 of the model WHS Act.
- strengthening investigative powers by inserting an additional information-gathering power for use when investigating potential breaches of the primary duty, based on section 155 of the model WHS Act.
- expanding the remedies available for breaches of the HVNL to include enforceable undertakings, based on Part 11 of the model WHS Act.
- clarifying the evidentiary status of codes of practice, based on sections 274 and 275 of the model WHS Act.

However the CoR Reforms do not extend to all parts of the HVNL and many prescriptive obligations remain. The mix of prescriptive requirements and the positive primary duty creates an inconsistent approach within the HVNL.

8.2 Review of HVNL Investigative and Enforcement Powers in Chapters 9 and 10 – a further opportunity for aligning the HVNL with the model WHS Act

The recommendations in this policy paper promote further alignment of the HVNL with the model WHS Act by:

- introducing authorised officer issued prohibition notices based on sections 195, 196 and 197 of the model WHS Act
- introducing court injunctions based on sections 215 and 240 of the model WHS Act
- developing a Compliance and Enforcement Policy underpinned by principles based on those used by Safe Work Australia.

However, as indicated in parts 3 and 4 of this policy paper the views of stakeholders diverge on the way forward regarding the simplification of the HVNL information-gathering powers and the entry, inspection, search and seizure powers.

There is, however, in principle support from all stakeholders that the HVNL should accord with best practice regulation and the performance based safety systems approach used in other national safety laws.

8.3 The need for a comprehensive review of the entire HVNL

A comprehensive review of the HVNL would provide an opportunity to consider:

- whether the HVNL reflects contemporary best practice regulation
- whether it aligns with the performance based safety systems approach adopted in other national safety laws.

These broad questions would enable many of the issues raised by stakeholders in their feedback on the discussion paper to be considered, including:

- the inconsistencies created by the mix of prescriptive and positive duties on different parties
- the complexities of the HVNL information-gathering powers and the entry, inspection, search and seizure powers
- incorporation of a principles based approach to assessing the provisions of the HVNL and for developing administrative and operational practices
- the effectiveness of the CoR and EoL reforms
- whether the 70 existing HVNL investigation powers could be replaced by the 18 investigation powers provided under the Model WHS Act².

In their feedback on the discussion paper, two road transport agencies expressly supported a further comprehensive review of the HVNL.

DEDJTR recommends:

a full review of the chain of responsibility and executive officer liability reforms, including the investigative and enforcement powers, be conducted nationally after a suitable period of the laws being in operation has transpired, to determine whether the amendments are effective and if an improvement in heavy vehicle safety is being realised.

DPTI suggests a two-step approach to greater alignment with the model WHS Act:

The transition from a prescriptive to risk-based approach requires a more detailed examination of Chapters 9 and 10, more suited to a broader review of the HVNL. DPTI proposes a two stage approach:-

- 1. Agree with the NTC's proposal (option 3) for the time being, noting our support for NSW's "general duties" approach, including a broader review of the HVNL; and*
- 2. Seek confirmation and agreement on when the HVNL can be reviewed in its entirety, preferably a phased review, with one of those phases being the review of Chapters 9 and 10 in the line with the NSW approach.*

Taking into account the stakeholder feedback, the NTC supports a comprehensive review of the HVNL, to be undertaken a suitable period after the commencement of the 2016 HVNL Amendment Act and the amendments resulting from the recommendations in this policy paper.

The NTC suggests that three years of operation would provide sufficient time to assess the effectiveness of the amendments. It would also allow the results of the Productivity Commission's review of the overall economic impact of the new national heavy vehicle framework to be taken into account. Initially scheduled for December 2016, and dependent on comprehensive implementation of the option, the Productivity Commission's review is expected to be commenced within the next few years. Three years would also allow for the collection of heavy vehicle crash data, if this was considered necessary. The NTC is of the view that decisions about the data necessary to show the effectiveness of the CoR Reforms should be made as part of agreeing the methodology of the review so that the NHVR, police and road transport agencies are prepared to collect agreed information and data from the date of commencement of the 2016 HVNL Amendment Act.

² This information on potential number of powers that could be replaced under the HVNL has been provided by TfNSW.

Recommendation 16

(a) That ministers agree in principle on the need for the HVNL to better:

(i) accord with contemporary regulatory best practice, and

(ii) align with the performance based safety systems approach of other national safety legislation.

(b) That subject to terms of reference, scope and approach being agreed by ministers, the NTC commence a comprehensive review of the HVNL in July 2021 (3 years after commencement of Chapter 2 of the 2016 HVNL Amendment Act) to consider:

(i) the effectiveness of the HVNL framework, including the CoR and EoL reforms, and

(ii) whether any amendments are required to ensure the HVNL is consistent with contemporary best regulatory practice and to more closely align the HVNL with WHS laws so as to improve compliance, safety outcomes and industry productivity.

(c) That the NTC present for ministers approval in November 2020 terms of reference for a comprehensive review of the HVNL, including scope, approach, methodology, timings and costings.

9 Next steps

Key points

- Arising from the recommendations in this policy paper, and subject to ministers' approval, a Bill to amend the HVNL will be prepared by the NTC for ministers' consideration in November 2017.
- As national regulator, the NHVR will lead implementation of any recommendations arising from this review, including the development of operational guidance and training.

The NTC has been requested to provide policy recommendations to ministers at their meeting in May 2017.

Subject to ministers approval of the policy recommendations, draft legislation to amend the HVNL will be prepared for ministers' consideration in November 2017. Following ministers' consideration, and if agreed, the amending legislation is likely to be tabled for consideration by the Queensland Parliament, as host jurisdiction for the HVNL, in early 2018. As previously agreed by ministers, there will be a single commencement date for all of the CoR and EOL reforms, including any legislative amendments that may be required as a consequence of this review of investigative and enforcement powers. Subject to passage of the legislation through the Queensland Parliament, an indicative commencement date of mid-2018 is proposed for all of these reforms.

Where the development of guidance materials and the training of authorised officers is required, this work will be led by the NHVR as the national regulator, with input from enforcement agencies and industry bodies. As per the on-road process guidelines agreed by the NHVR and police agencies, the agreed police applicability provisions will also apply to this guidance material. Police may also develop their own training programs.

As the national regulator, the NHVR will lead in communicating and promoting awareness of any changes to industry and enforcement agencies that may result as a consequence of this review. However, industry and enforcement agencies will also have a role to play in communicating the changes.

