



# Review of HVNL investigative and enforcement powers

Discussion Paper  
October 2016



National Transport Commission

# Report outline

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<b>Title</b>	Review of HVNL investigative and enforcement powers
<b>Type of report</b>	Discussion paper
<b>Purpose</b>	To examine whether agencies enforcing the HVNL have sufficient and appropriate investigative and enforcement powers to achieve the objectives of the law.
<b>Abstract</b>	This discussion paper sets out options for regulatory and operational reforms to reduce complexity and improve effectiveness of the HVNL investigative and enforcement power provisions in Chapters 9 and 10 of the law.
<b>Submission details</b>	Submissions will be accepted until <b>4pm Friday 9 December 2016</b> online at <a href="http://www.ntc.gov.au">www.ntc.gov.au</a> or by mail to:  Att: Review of HVNL investigative and enforcement powers National Transport Commission Level 15/628 Bourke Street Melbourne VIC 3000
<b>Key words</b>	Heavy Vehicle National Law, HVNL, Chain of Responsibility, CoR Compliance, Enforcement, Investigation, Sanctions, Remedies, Liability, Authorised Officers, Police
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# Executive summary

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In June 2016 transport ministers requested the National Transport Commission (NTC) to undertake 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. The review will identify potential regulatory or operational reforms to reduce complexity and improve effectiveness.

This review is driven by road transport and enforcement agencies' concerns about the complexity of the HVNL investigative and enforcement powers, especially in relation to the additional information-gathering power proposed as part of the CoR Reforms approved by ministers in November 2015. These are reflected in the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (Qld).

The purpose of this review is 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.

The HVNL investigative and enforcement powers provisions have been developed over many years, balancing the needs of regulators and the rights of individuals subject to the law. Changes should only be made where there is clear evidence of a problem and where this balance can be maintained.

The development of this discussion paper has been informed by preliminary consultation with key stakeholders, including industry, road transport agencies and enforcement agencies.

Stakeholder feedback expressed during preliminary consultation have identified a number of limitations with the HVNL investigative and enforcement powers. These limitations relate to the:

- complexity of the current investigative and enforcement provisions
- complexity arising from the new information-gathering power
- differences in the application of the investigative and enforcement powers and the need for national consistency.

In addressing these limitations, a number of stakeholders have emphasised the need for any legislative changes to be focused on ensuring safety, to be proportionate and to provide for natural justice and procedural fairness.

This paper:

- provides the historical context of the HVNL Chapter 9 and 10 investigative and enforcement powers provisions, and outlines the current legal framework
- summarises current operational practice in all participating states and territories in applying the HVNL Chapter 9 and 10 investigative and enforcement power provisions
- identifies potential *regulatory* barriers or gaps to achieving the policy intent of the HVNL Chapter 9 and 10 investigative and enforcement powers provisions
- identifies potential *operational or administrative* barriers or gaps to achieving the policy intent of the HVNL Chapter 9 and 10 investigative and enforcement powers provisions
- proposes legislative and operational reforms to improve the effectiveness of the HVNL Chapter 9 and 10 investigative and enforcement powers provisions.

Key issues are analysed under the following topics:

- information-gathering powers
- powers of entry, inspection, search and seizure
- available sanctions and the need for additional remedies
- evidentiary issues
- cross-jurisdictional issues.

For each topic, this paper outlines the issues raised, provides options, including an assessment of advantages and disadvantages, and proposes draft NTC recommendations. Stakeholder feedback is sought on these issues, options and proposals, and on the following questions:

Key issues identified by stakeholders:

- 1) Are there any additional issues with the HVNL investigative and enforcement powers provisions that have not been identified in this discussion paper? If so, please explain these issues.

#### Information-gathering powers:

- 2) If the NTC's proposal 1 was adopted, and the current information gathering approach was retained with any practical issues being addressed through the development of operational guidelines and training, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.
- 3) If the NTC's proposal 2 was adopted, and Section 569 of the HVNL was amended to clarify that electronic documents can be required to be produced in electronic form, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.
- 4) If the NTC's proposal 3 was adopted, and Section 570 of the HVNL was amended to ensure information about past journeys may be required, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.
- 5) If the NTC's proposal 4 was adopted, and there was no change to the HVNL, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.

#### Powers of entry, inspection, search and seizure:

- 6) If the NTC's proposal 5 was adopted, and changes were made to the HVNL entry, inspection, search and seizure powers on a provision by provision basis as evidence of issues are provided by stakeholders; with operational guidance and training also being developed what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.
- 7) If the NTC's proposal 6 was adopted and section 521 of the HVNL was amended to only allow authorised officers who are not police officers to enter a vehicle once police give permission; with operational guidance also being developed to assist authorised officers and police in applying section 521 of the HVNL, what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.
- 8) If the NTC's proposal 7 was adopted and section 522 of the HVNL was amended 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, 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, what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.

#### Available sanctions and the need for additional remedies:

- 9) If the NTC's proposal 8 was adopted and the HVNL was amended 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) what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.
- 10) If the NTC's proposal 9 was adopted and, either through administrative processes or an amendment to the HVNL, the NHVR was required to publish court outcomes including penalties imposed, what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.

#### Evidentiary issues:

- 11) If the NTC's proposal 10 was adopted and operational guidance and training was developed by the NHVR clarifying the evidentiary status of evidence lawfully obtained using police powers, what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.
- 12) If the NTC's proposal 11 was adopted and there were no changes made to the HVNL, what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.

Cross-jurisdictional issues:

- 13) If the NTC's proposal 12 was adopted and operational guidance material and protocols were developed by the NHVR clarifying cross-border investigations and prosecutions what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.
- 14) If the NTC's proposal 13 was adopted and Memoranda of Understanding or other protocols were developed by the NHVR to facilitate the sharing of information for the purposes of the HVNL between enforcement agencies, road transport agencies and the NHVR, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.

As this is a discussion paper, the NTC welcomes any additional comments, information or data stakeholders consider relevant and wish to be taken into account. The NTC will review the proposed options in the context of the evidence and feedback received. This could potentially result in the NTC altering its position on particular options.

Submissions will be accepted until **4pm Friday 9 December 2016** online at [www.ntc.gov.au](http://www.ntc.gov.au) or by mail to:

Att: Investigation and Enforcement Powers Review  
Heavy Vehicle Compliance and Technology Team  
National Transport Commission  
Level 15/628 Bourke Street  
Melbourne VIC 3000

Following receipt of stakeholder submissions, the NTC will prepare a policy paper with recommendations for transport ministers' consideration in May 2017.

Should ministers' agree to legislative change, the NTC will then prepare a draft Bill to amend the HVNL for ministers' consideration in November 2017. If the development of further guidance materials and training is required, this work will be led by the National Heavy Vehicle Regulator, as administrator of the law, with input from enforcement agencies and industry bodies and supported by the NTC.



# 1 Context

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## Key points

- In June 2016 transport ministers requested the NTC to undertake a review of all enforcement and investigative powers in Chapters 9 and 10 of the HVNL.
- The purpose of this review is 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.
- The development of this discussion paper has been informed by preliminary consultation with industry stakeholders, road transport agencies and enforcement agencies.

## 1.1 The request for this review

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In November 2015 transport ministers agreed policy recommendations for reforms to the chain of responsibility (CoR) and executive officer liability (EOL) provisions of the *Heavy Vehicle National Law* (HVNL), together referred to in this discussion paper as the CoR Reforms. These reforms recognised the need to ensure the HVNL continues to retain an effective investigative and enforcement regime. Transport ministers noted a comprehensive review of the Chapters 9 and 10 investigative and enforcement powers would be considered by the National Transport Commission (NTC) as a future project for inclusion in its forward work program.

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

## 1.2 Objectives

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The purpose of this review is 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.

This review is also a response to concerns raised by enforcement agencies about the potential complexity of including an additional information provision proposed to be introduced as part of the CoR Reforms to enable the gathering of evidence in support of a primary duty prosecution where information is held by a third party. Specifically, then, this review considers the information-gathering powers in Sections 569 and 570 of the HVNL and also the proposed new Section – Section 570A – power to require information from any person in relation to a contravention of the primary duty or that will assist to monitor or enforce compliance with the primary duty.

This discussion paper is the first step in this review process.

This paper:

- summarises current operational practice in all participating states and territories in applying the HVNL Chapters 9 and 10 investigative and enforcement powers provisions
- identifies potential *regulatory* barriers or gaps to achieving the policy intent of the HVNL Chapters 9 and 10 investigative and enforcement powers provisions
- identifies potential *operational or administrative* barriers or gaps to achieving the policy intent of the HVNL Chapters 9 and 10 investigative and enforcement powers provisions
- proposes legislative and operational reforms to improve the effectiveness of the HVNL Chapters 9 and 10 investigative and enforcement powers provisions.

## 1.3 Background

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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 for all road users, fairness, protection of the road network and the health and wellbeing of the community.

The NTC, and its predecessor the National Road Transport Commission (NRTC), have undertaken a considerable body of work to help improve compliance with, and the enforcement of, Australia's road transport laws.

Past reviews and model laws have included:

- *Compliance with the Road Transport Law: Principles, Objectives and Strategies Discussion Paper* (NRTC 1994)
- *Compliance and Enforcement Proposal* (NRTC 1995)
- development of draft general compliance and enforcement provisions (NRTC 1997)
- proposals on the penalty structure for gross overloading (NRTC 1998)
- *Compliance and Enforcement: Mass, Dimension and Load Restraint Policy* (NRTC 2000)
- *Road Transport Reform (Compliance and Enforcement) Bill – Draft Regulatory Impact Statement* (NRTC 2002)
- development of the Road Transport Reform (Compliance and Enforcement) Bill (NRTC 2003)
- a proposal for a *National Heavy Vehicle Enforcement Strategy* (NTC 2007)
- development of the *Heavy Vehicle National Law* (NTC 2012)
- the *Heavy Vehicle Compliance Review* (NTC 2013–14)
- a review by the independent Chain of Responsibility Taskforce (2012–14)
- the *Chain of Responsibility and Executive Officer Liability Reviews* (NTC 2014–16)
- *Heavy Vehicle Roadworthiness Review* (NTC 2015).

There are consistent themes throughout this work including increasing efficiency and safety for the road transport sector and harmonising investigative and enforcement powers. Many of these themes are addressed in the current HVNL or form part of the amendments recently agreed by ministers to give effect to the CoR Reforms. However, other aspects of these themes remain at issue and are explored in this discussion paper. These issues include reducing complexity for enforcement agencies, better facilitating information gathering, and simplifying authorised officer requirements. Key components of this work are outlined below.

## Development of the Compliance and Enforcement Model Law

The Road Transport Reform (Compliance and Enforcement) Bill (the C&E Model Law) was approved by ministers in 2003 as a model, nationally consistent and best practice legislative scheme applicable to heavy vehicles.<sup>1</sup> The primary object of the C&E Model Law was to improve compliance with and enforcement of jurisdiction road transport laws.

In preparing the C&E Model Law, the NRTC looked at other regulatory schemes operating in Australia and overseas. The NRTC also looked at models operating in other regulatory areas, such as environment protection; occupational, health and safety; and trade practices.

The theory of responsive regulation heavily influenced the development of the C&E Model Law. The C&E Model Law introduced the concept of CoR, whereby key off-road parties in the transport and logistics supply chain in a position to control and influence heavy vehicle on-road behaviour are identified and held legally responsible for actions which contribute to unsafe on-road behaviours. The C&E Model Law introduced new risk-based offences and contained new enforcement measures and sanctions designed to target particular forms of offending and to improve compliance by both on-road and off-road parties. The C&E Model Law therefore also included provisions empowering authorised officers to stop, move and inspect heavy vehicles, and to inspect premises to check compliance with the Australian road laws; to enter and search heavy vehicles and premises; to seize evidence; and to require the production of information from all parties in the transport chain. In addition, the C&E Model Law introduced provisions to improve

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<sup>1</sup> This model law is set out in the National Transport Commission (Road Transport Legislation – Compliance and Enforcement Bill) Regulations 2006 (Cwlth).

compliance with and enforcement of heavy vehicle mass, dimension and load restraint requirements.

The C&E Model Law also introduced new sanctions in affecting licences and registrations in addition to the usual fines and orders. These ranged from advisory and persuasive to punitive, depending on the severity of the non-compliance, including:

- improvement orders
- formal warnings
- commercial benefits orders
- supervisory intervention orders
- prohibition orders.

As discussed in Chapter 2 of this discussion paper, the C&E Model Law provides the basis for Chapters 9 and 10 of the HVNL.

## **National Heavy Vehicle Enforcement Strategy**

In November 2007 the NTC published a proposal for a *National Heavy Vehicle Enforcement Strategy*.

The purpose of the strategy was to improve compliance with road transport laws by enhancing enforcement practices across Australia. To achieve this outcome the following objectives were identified:

- increased use of intelligence-driven enforcement
- consistent, effective and efficient enforcement practices
- increased cooperation and understanding between industry and enforcement agencies
- specific and appropriate training for enforcement officers
- increased cooperation and information sharing by enforcement agencies.

To provide these outcomes, the strategy included:

- consideration of the creation of secure platforms for data sharing
- identification of systematic, recidivist and high-risk offenders, audits of breaches involving multiple jurisdictions
- improved cooperation between agencies
- enforcement along the CoR
- improved communications between agencies and industry
- establishment of liaison officers
- better training for enforcement officers
- nationally consistent guidelines.

The strategy was approved in-principal by transport ministers in 2008, and in early 2009 the NTC undertook a more detailed cost-benefit analysis. However, in late 2009 transport ministers deferred consideration and implementation of the strategy, pending the completion of work to establish the National Heavy Vehicle Regulator (NHVR).

## **Development of the Heavy Vehicle National Law and the establishment of the NHVR**

In 2009 the Council of Australian Governments (COAG) agreed to establish a national regulator and a national body of law for the regulation of all vehicles over 4.5 tonnes, and in 2011 the *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform* was signed, formalising this intent. The intergovernmental agreement provided the framework for the HVNL and the NHVR.

The HVNL incorporated all previously developed model laws regarding heavy vehicles, and encompassed heavy vehicle registration, safety standards, mass, dimension and load restraint, speeding, driver fatigue, establishment of the intelligence access program, and alternative compliance through the use of accreditation schemes.

The HVNL was proclaimed in 2012 and the NHVR commenced operations in January 2013.

## NTC Heavy Vehicle Compliance Review

In 2013 the NTC commenced a review of heavy vehicle compliance to understand the then current practice in heavy vehicle compliance and enforcement across Australia; to explore the motivations for non-compliance; to analyse the powers available under the HVNL to secure compliance, including where and how they are used; and to develop findings aimed at promoting compliance.

The *Heavy Vehicle Compliance Review Final Report* was published by the NTC in June 2014.

Review findings of relevance included:

- a national data strategy to assist the collection, assessing and use of heavy vehicle intelligence
- the NHVR's education role
- guidelines on the use of improvement notices
- a published NHVR compliance and enforcement policy
- publication of data on the use of enforcement tools and prosecution outcomes
- publication of data on the use of infringement notices and reviews of infringements
- data on court-imposed penalties and reasons for court decisions.

## Chain of Responsibility Taskforce Review 2014

Since 1997, Australia's heavy vehicle laws have included the concept of CoR, which recognises the on-road effects of the actions, inactions and demands of off-road parties in the transport and supply chain and provides for their accountability.

In November 2012, in response to a request from industry, transport ministers established a taskforce to review the HVNL CoR provisions, the Chain of Responsibility Taskforce (CoR Taskforce). The final report of the taskforce, *CoR Review: Taskforce Report* was released in June 2014. This report recommended:

- priority be given to the development of NHVR enforcement guidelines for authorised officers making decisions that pertain to the CoR regime. These guidelines should extend to situations where authorised officers break seals. Where possible the guidelines should be developed in consultation with police
- allowing authorised officers, including police, to notify operators that driver breaches under the HVNL have occurred, subject to further consideration of procedural fairness, privacy considerations and operational practicalities
- after the NTC has established a process to investigate the development of broader duties within the CoR, that the powers of authorised officers be revised
- the NHVR develop prosecution guidelines to provide for the types of matters that should be considered before a prosecution is brought under the HVNL
- stronger guidance be given to WHS (work health and safety) authorities so that it is clearer to them that the NTC guidelines must be regarded as authoritative.

## NTC Chain of Responsibility and Executive Officer Liability reviews

Arising from the CoR Taskforce review, the NTC was requested to undertake further investigation of both the existing CoR regime and EOL. In November 2014 the NTC released its *Chain of Responsibility Duties Review*, with its assessment of EOL finalised the following year. Both reviews sought to identify legislative change to improve road safety and to encourage a proactive culture of compliance by clarifying and restructuring the HVNL CoR regime and EOL obligations as a primary duty of care to ensure the safety of road transport operations.

After significant consultation, in November 2015 ministers endorsed the recommendations from the NTC reviews of CoR and EOL, and roadworthiness. Of relevance, these papers recommended:

- as a corollary to the introduction of a primary duty for CoR parties, the HVNL be amended to strengthen information-gathering powers
- the HVNL be amended to enable the use of voluntary enforceable undertakings
- the HVNL be amended to clarify the evidentiary status of codes of practice consistent with s.275 of the WHS Model Law

- the NTC consider a comprehensive review of the HVNL investigative and enforcement powers, including the use of alternative remedies such as prohibition notices by authorised officers.

On 13 September 2016 the legislation giving effect to these amendments, the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (the 2016 Amendment Bill) was introduced into the Queensland Parliament, as the host jurisdiction for the HVNL. The Bill has been referred to the Transportation and Utilities Committee for consideration and reporting back to parliament by 1 November 2016.

## 1.4 Preliminary consultation

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The development of this discussion paper has been informed by preliminary consultation with, and data and feedback from the following key stakeholders:

- Department of Planning, Transport and Infrastructure, South Australia
- Department of State Growth, Tasmania
- Department of Transport and Main Roads, Queensland
- Department of Justice and Attorney General, Queensland
- Department of Justice, New South Wales
- Department of Justice, Victoria
- Queensland Police Service
- South Australia Police
- Tasmania Police
- Transport for New South Wales
- VicRoads
- Victoria Police
- Western Australia Police
- National Heavy Vehicle Regulator
- Transport Roads and Maritime Services, New South Wales
- Australian Logistics Council
- Australian Trucking Association
- National Road Transport Association
- Australian Livestock and Rural Transporters Association.

## 1.5 How to make a submission

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Submissions on this discussion paper will be accepted until **4pm Friday 9 December 2016**.

Any individual or organisation may make a submission to the NTC. To make an online submission, please visit [www.ntc.gov.au](http://www.ntc.gov.au) and select 'Submissions' from the top navigation menu. Alternatively, you can mail your comments to:

Att: Review of HVNL investigation and enforcement powers  
National Transport Commission  
Level 15/628 Bourke Street  
Melbourne VIC 3000

Where possible, you should provide evidence, such as data and documents, to support your views.

Unless you clearly ask us not to, we will publish all submissions online. However, we will not publish submissions that contain defamatory or offensive content.

The *Freedom of Information Act 1982* (Cth) applies to the NTC.

## 2 Legal framework

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### Key points

- The investigative and enforcement powers available under the heavy vehicle legal framework have developed over time to ensure that authorised officers can appropriately administer the law.
- The current investigative and enforcement provisions of the HVNL have their origins in the road transport model laws as developed by the NTC.
- In early 2016 transport ministers approved further amendments to the HVNL to strengthen information-gathering powers in light of the CoR Reforms.

This chapter outlines the key provisions of the HVNL relevant to this review, including the amendments in the 2016 Amendment Bill proposed by the 2016 CoR Reforms. This chapter then compares the approach to securing compliance under the HVNL with the approach adopted under the model WHS Act, which some stakeholders have suggested is an appropriate compliance and enforcement model that should be adopted for the HVNL.

### 2.1 Heavy Vehicle National Law

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The HVNL is Australia's key legislation regulating heavy vehicles with a gross vehicle mass of 4.5 tonnes and above. The HVNL, as a national applied law scheme, is enacted in Queensland as host jurisdiction and is adopted and applied by participating states and territories as a law of their own jurisdiction. All Australian states and territories, except Western Australia and the Northern Territory, are participating in the HVNL at this time.

As already noted, the investigative and enforcement provisions in Chapter 9 of the HVNL and the sanctions provisions in Chapter 10 of the HVNL have their origins in the C&E Model Law, as well as the *Road Transport – Heavy Vehicle Driver Fatigue Act 2006* and the *National Transport Commission (Model Act on Heavy Vehicle Speeding Compliance) Regulations 2008*.

In particular, Chapter 9 of the HVNL empowers authorised officers to:

- stop<sup>2</sup> and move<sup>3</sup> heavy vehicles
- enter and inspect heavy vehicles for monitoring purposes<sup>4</sup>
- enter and search heavy vehicles involved or suspected to be involved in an offence<sup>5</sup>
- enter a 'relevant place'<sup>6</sup> and exercise 'general powers'<sup>7</sup> for monitoring purposes
- enter 'places'<sup>8</sup> and exercise 'general powers'<sup>9</sup> for investigation purposes
- seize evidence<sup>10</sup>
- require production of documents and information.<sup>11</sup>

In addition, Chapter 9 of the HVNL empowers authorised officers to issue improvement notices.<sup>12</sup>

Issues in relation to the exercise of these powers are further explored in Chapters 5 and 6 of this discussion paper.

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<sup>2</sup> Section 513.

<sup>3</sup> Sections 516 and 517.

<sup>4</sup> Section 520.

<sup>5</sup> Section 521.

<sup>6</sup> Section 495.

<sup>7</sup> Section 496.

<sup>8</sup> Sections 497, 498 and 499.

<sup>9</sup> Section 500.

<sup>10</sup> See for example Sections 545 and 546.

<sup>11</sup> Sections 568, 569 and 570.

<sup>12</sup> Section 572.

Chapter 10 of the HVNL empowers authorised officers to issue formal warnings<sup>13</sup> and infringement notices.<sup>14</sup> In addition, Chapter 10 of the HVNL provides the courts with a range of sanctions and remedies to address non-compliance. These include:

- commercial benefits penalty orders<sup>15</sup>
- cancelling or suspending registration<sup>16</sup>
- supervisory intervention orders<sup>17</sup>
- prohibition notices<sup>18</sup>
- compensation orders.<sup>19</sup>

Issues in relation to the use of these sanctions are considered in Chapter 7 of this paper.

## 2.2 2016 Chain of Responsibility Reforms

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In June 2016 transport ministers approved a Bill to amend the HVNL to give effect to the CoR Reforms, that is, to reformulate the existing CoR obligations as a positive primary duty of care on CoR parties, similar to the primary duties in the model WHS Act. In September 2016, the 2016 Amendment Bill was introduced into the Queensland Parliament.

The 2016 Amendment Bill is intended to ensure a more outcomes-based approach, promoting a proactive culture of safety and enforcement, and better alignment with Australia's other national safety laws. The amendments also strengthen the information-gathering powers by amending the HVNL to include an additional information-gathering power provision to enable authorised officers to gather information from third parties when investigating potential breaches of the primary duty. This additional information-gathering power is to be available where an authorised officer has a reasonable belief that a person is capable of giving information in relation to a possible contravention of the primary duty or that will assist in monitoring or enforcing compliance with that duty. This additional information-gathering power is set out at Clause 91 of the Bill and will introduce a new Section – Section 570A – into the HVNL modelled on Section 155 of the model WHS Act.<sup>20</sup> It contains the same safeguards as the WHS provisions to ensure the power is exercised for proper purposes. The new Section 570A is extracted at Appendix A.

The 2016 Amendment Bill expands the remedies available for breaches of the HVNL to include voluntary enforceable undertakings. Voluntary enforceable undertakings are an alternative to prosecution where a party agrees to take specified steps to ensure compliance. This additional remedy is set out at Clause 96 of the Bill which inserts a new Part 10.1A Enforceable Undertakings into the HVNL. This new part of the HVNL is modelled on Section 251 of *the Rail Safety National Law* and Section 216 of the model WHS Act. New Part 10.1A is extracted at Appendix A.

In addition, the 2016 Amendment Bill removes the reverse burden of proof on executive officers as part of reformulating the existing CoR offences for executive officers as a positive due diligence obligation to ensure that their corporation complies with the primary duty. The effect of this is that the prosecution will bear the burden of proof, with the executive officer innocent until proven guilty.

## 2.3 Is there a need for a national compliance and enforcement policy?

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As with many other laws, the HVNL does not include the securing of compliance as one of its objects. Instead, Section 4 of the HVNL provides that the object of the HVNL is to be achieved by a regulatory framework that imposes duties and obligations directed at ensuring heavy vehicles and drivers of heavy vehicles comply with the requirements prescribed in the law. In this context, Section 659 of the HVNL provides that the main function of the NHVR, as national regulator, is to achieve the object of the HVNL. This includes:

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<sup>13</sup> Section 590.

<sup>14</sup> Section 591.

<sup>15</sup> Section 597.

<sup>16</sup> Section 598.

<sup>17</sup> Section 600.

<sup>18</sup> Section 607.

<sup>19</sup> Section 611.

<sup>20</sup> See Appendices A and C for extracts of both provisions.

- monitoring compliance
- investigating actual or possible contraventions
- bringing proceedings
- identifying and promoting best-practice methods for compliance
- encouraging and promoting safe and productive business practices
- working collaboratively with other law enforcement agencies to ensure a nationally consistent enforcement approach
- working collaboratively with road managers, the NTC and industry to ensure a wide understanding of the HVNL.

In contrast, Section 3 of the model WHS Act provides as its main object to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by securing compliance through effective and appropriate compliance and enforcement measures. In this context, the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*, and the *Safe Work Australia Act 2008* (Cwlth) provides that the harmonised work health and safety laws are to be complemented by a nationally consistent approach to compliance and enforcement. The *Safe Work Australia Act* expressly provides that one of the functions of Safe Work Australia is to develop policy dealing with the compliance and enforcement of the Australian laws that adopt the model WHS Act, to ensure that a nationally consistent approach is taken to compliance and enforcement.

Accordingly, Safe Work Australia has developed the *National Compliance and Enforcement Policy*, setting out the approach that work health and safety regulators are to take to monitor and enforce compliance with the model WHS Act and Regulations. This policy document includes principles endorsed by the Workplace Relations Ministers' Council. These principles operate alongside other nationally agreed policies and procedures governing the use of specific regulatory tools, or policies that may be specific to each regulator, where they relate to the regulator's interface with the criminal justice system in their jurisdiction.

### Extract from the National Compliance and Enforcement Policy

<b>3. Key Principles</b> The following principles underpin all work health and safety compliance and enforcement activities.	
<i>Consistency</i>	Regulators endeavour to ensure that similar circumstances at workplaces lead to similar approaches being taken, providing greater protection and certainty in workplace and industry.
<i>Constructiveness</i>	Regulators provide support, advice and guidance to assist compliance with work health and safety laws and build capability.
<i>Transparency</i>	Regulators demonstrate impartiality, balance and integrity.
<i>Accountability</i>	Regulators are willing to explain their decisions and make available avenues of complaint or appeal.
<i>Proportionality</i>	Compliance and enforcement responses are proportionate to the seriousness of the conduct.
<i>Responsiveness</i>	Compliance and enforcement measures are responsive to the particular circumstances of the duty holder or workplace.
<i>Targeted</i>	Activities are focused on the areas of assessed highest risk or the work health and safety regulators' strategic enforcement priorities.

One jurisdiction has suggested these principles provide a useful model for a nationally consistent approach for securing compliance under the HVNL. However, given the terms of this review as agreed by ministers, it is considered this issue is outside the review scope.

## 3 Current operational practice

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### Key points

- The use of roadside interventions is crucial in ensuring that drivers and heavy vehicles comply with the requirements of the HVNL.
- Roadside enforcement can also result in the investigation of those off-road parties recognised in the HVNL as having a role in controlling and influencing heavy vehicle on-road behaviour.
- It is vital that roadside and investigation powers available to authorised officers are able to address non-compliant, unsafe behaviour.

This chapter outlines two primary means by which compliance with the HVNL is secured by enforcement agencies: roadside interventions and CoR investigations. This chapter then details state and territory operational practice and use of the current existing HVNL investigative and enforcement power provisions.

### 3.1 Roadside interventions

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Authorised officers use roadside interventions, in particular roadside inspections, to ensure drivers and heavy vehicles comply with the requirements of the HVNL concerning mass, dimension and load restraint, vehicle access, vehicle standards, speed limiter compliance, driver fatigue and vehicle roadworthiness. If a breach is detected, there are various measures available under the HVNL that may be taken at the roadside by authorised officers, including issuing:

- vehicle defect notices under Section 526 of the HVNL
- improvement notices under Section 572 of the HVNL
- formal warnings under Section 590 of the HVNL
- infringement notices under Section 591 of the HVNL
- requiring a driver to rest for contravention of maximum work requirements or minimum rest requirements under Sections 538 and 539 of the HVNL.

As discussed later in this chapter, formal warnings and infringement notices are the two most commonly used enforcement tools.

### 3.2 Chain of responsibility

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Roadside enforcement can also result in the investigation of those off-road parties that are recognised in the HVNL as having a role in controlling and influencing heavy vehicle on-road behaviour. So too, can intelligence-driven, targeted investigations into the business practices of a company that cause, enable, encourage, or demand unlawful behaviours.

These off-road parties are identified and described in the HVNL as ‘the parties in the chain of responsibility’.

CoR is a key pillar of the HVNL and is designed to ensure that any key off-road party in a position to influence and/or control on-road behaviour is identified and held legally accountable. In simple terms, CoR is about recognising the on-road effects of the actions, inactions and demands of key off-road parties in the transport and logistics supply chain, and provides a mechanism for holding these off-road parties accountable. CoR means that the operators of trucking businesses can be held legally responsible for their fatigued drivers and that a loading manager at a distribution centre can be held responsible for a truck that loses its load due to inadequate or unsafe loading practices. The HVNL CoR provisions apply to operators, prime contractors, employers, schedulers, consignors and consignees, loading managers, loaders, packers and unpackers and cover all key safety areas of the HVNL, including speed, fatigue, and mass, dimension and load restraint.

CoR differs from other heavy vehicle road enforcement activities in that directly observable breaches, such as fatigue or speed offences committed by the driver, are viewed as a potential consequence of inappropriate risk management or unlawful practices by one or more of the CoR parties.

### 3.3 Use of the HVNL enforcement tools and sanctions

As part of the preliminary consultation informing the development of this discussion paper, the NTC sought enforcement agencies' comment on the use of the investigative and enforcement power provisions of the HVNL, including sanctions. As the table below shows, states and territories have adopted a range of regulatory approaches having reliance on different tools and sanctions.

How widely are improvement notices and formal warnings used?	
Queensland	Improvement notices
South Australia	Improvement notices
Victoria	Improvement notices and formal warnings
New South Wales	Improvement notices and formal warnings
Tasmania	Neither are currently used
ACT	Improvement notices and formal warnings have not been widely used
What court sanctions are currently being used?	
Queensland	Fines
South Australia	Fines and supervisory intervention orders
Victoria	Fines, good behaviour bonds and community-based orders
New South Wales	Fines, supervisory intervention orders, compensation orders following damage to infrastructure, and licence and registration cancellation/suspension
Tasmania	Fines
ACT	Courts have not yet been asked to consider matters under the HVNL

### 3.4 Education and support

To ensure consistency in the way the HVNL Chapters 9 and 10 investigative and enforcement powers provisions are exercised, extensive training of authorised officers is required. This was recognised most recently in the CoR Reforms recommendations which noted that training and the development of guidance materials and codes of practice was required for both industry and regulators, including all authorised officers.

To further this recommendation the NHVR has indicated that it is undertaking the following:

- development of a national investigations manual – to be the cornerstone of improving investigative practice by providing structure and consistency across the nation. By defining the methodologies to be employed, creating procedures in the application of the various laws, and establishing codified practices, investigators will be able to undertake their roles in a uniform manner in every part of the country
- prosecutor development – to establish clarity for the practice and understanding of the complexities of the HVNL, particularly the CoR provisions, by providing training to prosecutors. Ensuring that staff are well trained and well apprised of CoR law/issues/risks will enable improved advocacy and generate better outcomes when prosecutions are undertaken
- investigator development – to ensure consistent knowledge, skills and capabilities across the nation the NHVR is building an Investigator Development Program
- industry education – to help the heavy vehicle industry to better understand the requirements, obligations and the provisions of CoR law generally, the NHVR will provide education workshops as a component of a broader program to increase awareness of CoR requirements across the entire supply chain. With the goal to deliver improved skills for interpreting statutory requirements, assessing and responding to risk, and providing tools that enable all parties to install sound business practices for CoR compliance, the NHVR workshops will assist in preparing industry for the primary duty and EOL amendments
- development of industry guidance materials – along with the industry workshops, the NHVR will provide free tools and information for managing compliance and safety, and promote known best practices that build features of compliance management systems. In the future, the guidance materials will also assist in the construct of codes of practice.

Products will include videos, podcasts, fact sheets, bulletins, brochures, and use of a range of other media.<sup>21</sup>

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<sup>21</sup> Correspondence between NTC and NHVR.

## 4 Key issues identified by stakeholders

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### Key points

Enforcement agencies and key industry 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
- differences in the application of the investigative and enforcement powers
- 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.

Both enforcement agencies and key industry stakeholders have identified limitations with the HVNL investigative and enforcement powers provisions. These limitations 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, resulting in a greater focus on road transport safety.

This chapter details the key issues raised by stakeholders during the preliminary consultation undertaken in preparing this discussion paper.

### 4.1 Complexity of current Chapter 9 provisions

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As part of the preliminary consultation, enforcement agencies have raised concerns that the existing HVNL power of entry provisions are overly complex. In particular, concern has been raised about the distinctions in the HVNL between 'places' and 'vehicles', and 'monitoring' and 'investigation'. 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.

### 4.2 Complexity arising from new information-gathering power

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As a part of the CoR Reforms, transport ministers have agreed that the HVNL be amended to include an additional information-gathering power to be available only when investigating breaches of the primary duty. This new information-gathering power will enable certain authorised officers, including police, to require information, documents and evidence from *any person* the authorised officer reasonably believes capable of giving information in relation to a possible contravention of the primary duty of care or that will assist the authorised officer to monitor or enforce compliance with the primary duty of care. This new information-gathering power is set out at Clause 91 of the Bill and will introduce a new Section – Section 570A – into the HVNL. This new Section 570A of the HVNL is modelled on Section 155 of the model WHS Act and is intended to supplement and complement the existing information-gathering powers in Sections 569 and 570 of the HVNL.

With the inclusion of the new Section 570A information-gathering power there will be three distinct information-gathering powers available to authorised officers, all of which may be applied in a particular circumstance. In other words, in relation to the same substantive offence, all three powers could be exercised.

#### Example – suspected minor mass offence under Section 96 of the HVNL

In the event of a single suspected minor mass offence under Section 96 of the HVNL, all three information-gathering powers could potentially be used:

- under Section 569, an authorised officer could require that a *responsible person* produce documents, devices or things at a reasonable time and place nominated by the officer. The request would *not* need to be in writing and would *not* need to be based upon a suspected breach

AND

- under Section 570, an authorised officer could require a *responsible person* to provide the officer with information about the vehicle, its load or equipment, and details about other people responsible for the vehicle. The request would *not* need to be in writing and would *not* need to be based upon a suspected breach

AND

- under the proposed new Section 570A information-gathering power and in relation to a contravention of the primary duty of care only, an authorised officer could, *by notice*, require *any person* to provide information if they *reasonably believed* that the person was capable of giving information about the possible mass contravention.

In this context a number of enforcement and road transport agencies have also expressed concern that this additional information-gathering power may create further complexity, undermining the integrity of the HVNL. In particular, a number of enforcement agencies are concerned that the changes to the information-gathering power provisions of the HVNL 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 have also raised concerns about the limitation of the new Section 570A information-gathering power, in that it will only allow 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. These stakeholders suggest instead that the new information-gathering power should 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 issue is considered further in Chapter 5.

### 4.3 Consistent application of law

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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 the consistent application of what is intended to be nationally harmonised law and procedure.

As part of the preliminary consultation, industry stakeholders 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. For these stakeholders, this is an essential precondition to achieving a nationally harmonised approach to the HVNL.

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

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As part of the preliminary consultation for this review, 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 to the rights and liberties of individuals in accordance with 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. In addition, and where changes to the HVNL are proposed, this includes ensuring that any changes include appropriate procedural safeguards and human rights protections.

## Questions

- 1) Are there any additional issues with the HVNL investigative and enforcement powers provisions that have not been identified in this discussion paper? If so, please explain these issues.

## 5 Information-gathering powers

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### Key points

- A number of stakeholders have expressed concern that the proposed introduction of a broad information-gathering power to support enforcement of the new primary duty obligation, will create unnecessary additional complexity and may lead to information gathered in relation to an offence using one power being inadmissible in relation to another associated offence.
- This chapter examines three proposals to improve the existing information-gathering powers to improve their effectiveness.

This chapter also examines whether the information-gathering power provisions of the HVNL should be simplified, and whether any other amendments should be made to improve the effectiveness of the existing powers.

### 5.1 Existing legal framework

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Information gathering is an essential aspect of law enforcement. Information-gathering powers are necessary to enable the monitoring of compliance with, and to investigate alleged contraventions of, the law. Where necessary information is not able to be obtained voluntarily, the law and the HVNL must include coercive powers to require it. The information obtained can 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 person*<sup>22</sup> 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 Amendment Bill includes an additional information-gathering power solely for use in relation to the new primary duty obligation. This new provision, Section 570A, will empower specified classes of authorised officers, including police, to require from any person information in relation to a possible contravention of, or to monitor or enforce compliance with, the primary duty. Section 570A includes similar protections from self-incrimination as Section 172 of the model WHS Act, as well as expressly providing for the following other safeguards:

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

### 5.2 Preliminary consultation feedback

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Preliminary stakeholder feedback has focused on three matters: whether the proposed new information-gathering power should be extended to apply across the entire HVNL, rather than

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<sup>22</sup> 'Responsible persons' is defined in Section 5 of the HVNL and is set out at Appendix B.

being limited for use solely in relation to the new primary duty obligation; on the complexities created by the interaction of these existing information-gathering powers with the proposed new information-gathering power; and on the limitations of the existing information-gathering powers (Sections 569 and 570 of the HVNL).

As part of the preliminary consultation, several enforcement and road transport agencies expressed support for the extension of the proposed new Section 570A information-gathering power to apply across the entire HVNL. One benefit of this approach would be that the current limitations in Sections 569 and 570 of the HVNL would be addressed. Information could be obtained from any person, including third parties, in relation to possible contraventions of any offence under the HVNL, and to monitor and enforce compliance with any duty in the HVNL. For example, such a widening of the proposed new Section 570A information-gathering power would enable telematics data and speed-limiter compliance data to be obtained from persons not captured by the definition of 'responsible person'. These enforcement and road transport agencies considered that such an extension of the new Section 570A information-gathering power would also better ensure consistency with the information-gathering power in Section 155 of the model WHS Act, particularly if the extension were to involve repealing the current Sections 569 and 570 of the HVNL. However, as an alternative, one enforcement agency suggested retaining Section 569 of the HVNL on the basis it is a useful on-road enforcement tool.

In contrast, a number of justice and road transport agencies and one enforcement agency were of the view the existing information-gathering powers were adequate to address existing offences and that the proposed new information-gathering power should not be applied broadly. For these agencies, any potential overlaps or complexities in relation to the exercise of the information-gathering powers could be addressed through the development of operational procedures and guidance, and the provision of training.

Preliminary feedback from industry stakeholders did not support any extension of the new information-gathering power, arguing it would make the power too broad. In particular, industry stakeholders were concerned that such an extension would enable information to be obtained from persons with contractual relationships to CoR parties but no statutory obligations under the HVNL. Industry stakeholders considered that without evidence demonstrating a problem with the suite of information-gathering powers, such an extension of the new information-gathering power would be disproportionate and without justification.

A number of enforcement and road transport agencies were also concerned that the interaction between the existing and proposed new information-gathering powers could cause enforcement difficulties because of different coverage, application, and safeguards, for example whether documents obtained by notice under one section of the HVNL could be used in proceedings for other HVNL offences. There was no consensus in the preliminary feedback on whether the solution lies in legislative change to create one information-gathering power, or in providing more training and guidance materials.

In addition to concerns regarding the proposed new information-gathering power, a number of shortcomings with the existing information-gathering powers were also identified by enforcement agencies:

- the requirement in Section 569 of the HVNL for electronic documents to be reproduced as a 'clear written reproduction of the electronic document', with the effect that electronic documents cannot be required in electronic format
- there is no requirement for a responsible person in Sections 569 and 570 of the HVNL to identify another party, who is not a responsible person, where that person holds information relevant to an investigation
- the need to clarify Section 570 of the HVNL to ensure information about past journeys can be required.

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

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Some enforcement and road transport agencies have suggested 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. 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, or if all three HVNL information-gathering powers were to be applied to all offences under the HVNL.

The differences between the three HVNL information-gathering powers are summarised in the following table.

	s.569 HVNL	s.570 HVNL	New information-gathering power (s.570A)
<b>When can the power be used?</b>	no limit	compliance purposes (monitoring and investigation) only	possible contravention of, or to assist monitoring and enforcing of compliance with, the primary duty
<b>What information can be obtained?</b>	documents, device, thing required to be kept under the HVNL, or relating to the heavy vehicle and its use, or relating to any business practices	information about the vehicle, its load or equipment, its start time and intended route; and the personal details of any other responsible persons for the vehicle.	any information
<b>From whom can the information be obtained?</b>	'responsible persons' only	'responsible persons' only	any person
<b>Reasonable belief required?</b>	no	no	yes - authorised officer must have a 'reasonable belief'
<b>Who may exercise powers?</b>	any authorised officer	any authorised officer	pecially appointed authorised officers
<b>In what form must the request for information be made?</b>	no requirement that the request be made in writing	no requirement that the request be made in writing	request for information must be made by notice
<b>What protections are provided to the person providing the information?</b>	limited protection against self-incrimination – no protection in relation to documents provided	limited protection against self-incrimination – no protection in relation to documents provided	complete protection against self-incrimination: protection in relation to both information and documents provided

Three options are identified to address the issues identified by stakeholders.

**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.**

**Advantages**

- enables comprehensive information gathering by allowing any information in documentary or oral form to be obtained from any person, which is critical for effective investigations and prosecutions. This supports the HVNL enforcement regime and improves compliance, leading to safer outcomes and reinforcing the safety objective of the HVNL
- information obtained can be used to prosecute any offence in the HVNL, overcoming the limitations of the existing information-gathering powers
- ensures consistency of approach with the model WHS Act, which was one of the general aims of the CoR Reforms
- reduces issues in relation to the admissibility of evidence, for example, that evidence obtained in relation to a non-primary duty offence may be inadmissible in relation to a primary duty offence.

**Disadvantages**

- request must be made by notice
- only applies in relation to information and not devices and things
- power may be broader than necessary for investigating non-primary duty offences and therefore may be a disproportionate and inappropriate power
- a document would not be admissible as evidence if it incriminates the person providing it. This may restrict the evidence that could be used in prosecutions, for example a driver providing a work diary page.

**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.**

**Advantages**

- enables comprehensive information gathering, which is critical for effective investigations and prosecutions. This supports the enforcement regime and improves compliance, leading to safer outcomes and reinforcing the safety objective of the HVNL
- information obtained can be used to prosecute any offence in the HVNL, overcoming the limitations of the existing information-gathering powers
- reduces issues in relation to the admissibility of evidence, for example, that evidence obtained in relation to a non-primary duty offence may be inadmissible in relation to a primary duty offence
- provides maximum flexibility for enforcement agencies
- the ability to require devices and things would be retained
- safeguards and protections in Sections 569 and 570 of the HVNL and the new information-gathering power would remain.

**Disadvantages**

- the new information-gathering power may be broader than necessary for investigating non-primary duty offences and therefore may be a disproportionate and inappropriate power
- complex and does not support simplification of the HVNL
- inconsistent with the model WHS Act approach
- admissibility issues remain.

**Option 3: Maintain current 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.**

**Advantages**

- ensures appropriate and proportionate powers are available to investigate potential breaches of the primary duty
- retains the existing HVNL information-gathering provisions in Sections 569 and 570 for use in investigating potential breaches of the HVNL
- provides appropriate protections in relation to the collection and use of the information obtained
- provides an appropriate and proportionate balance between human rights and effective enforcement
- operational guidance and training is an accepted and widely used tool to address potential complexities in administering the HVNL and could be adapted or specifically developed to address the new information-gathering power.

**Disadvantages**

- there may be issues in relation to the admissibility of evidence, for example, that evidence obtained in relation to a non-primary duty offence may be inadmissible in relation to a primary duty offence
- complex and does not support simplification of the HVNL
- inconsistent with the model WHS Act approach.

**Options for consideration:**

*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 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.*

***NTC proposal 1: Adopt Option 3: Maintain current 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 guidelines and training.***

***The NTC considers that Option 3 provides an appropriate and proportionate balance between human rights and effective enforcement.***

#### Questions (continued)

- 2) If the NTC's proposal 1 was adopted, and the current information gathering approach was retained with any practical issues being addressed through the development of operational guidelines and training, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.

## 5.4 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'. Accordingly, currently under the HVNL there is 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. 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 so that an electronic document can be required to be produced in electronic form.

#### **Advantages**

- simplifies and accelerates the production of requested documents, resulting in savings to both industry, in compliance costs, and enforcement agencies, in reviewing the documents provided.

#### **Disadvantages**

- may result in additional requests for electronic information being made.

#### **Options for consideration:**

*Option 1: Amend Section 569 of the HVNL to clarify that electronic documents can be required to be produced in electronic form.*

*Option 2: No change. Do not amend the HVNL.*

***NTC proposal 2: Adopt Option 1: Amend Section 569 of the HVNL to clarify that electronic documents can be required to be produced in electronic form.***

***The NTC considers that this amendment will simplify the production of requested documents. It recognises the prevalence of electronic data and considers this change will result in more effective operation of the HVNL.***

### Questions (continued)

- 3) If the NTC's proposal 2 was adopted, and Section 569 of the HVNL was amended to clarify that electronic documents can be required to be produced in electronic form, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.

## 5.5 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 heavy vehicles for compliance purposes. As part of the preliminary consultation, one enforcement agency has suggested that consideration be given to amending Section 570 of the HVNL, which refers to information about the 'current or intended' journey of a vehicle, to clarify that information about past journeys may also be requested. Although principles of statutory interpretation would 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 risk that the evidence may be challenged in court. It should be noted that a person required to provide information under this section must comply unless they have a reasonable excuse, which includes that they 'did not know, and could not be reasonably expected to know or ascertain, the information'.

### Advantages

- removes the perceived limitation in Section 570 of the HVNL
- enables information about the vehicle's past journeys (including its intended route) to be obtained and used in evidence without the risk of an unnecessary challenge which could delay proceedings and increase costs.

### Disadvantages

- may be seen to needlessly extend the range of information that may be required under Section 570 of the HVNL.

### Options for consideration:

*Option 1: Amend Section 570 of the HVNL to ensure information about past journeys may be required.*

*Option 2: No change. Do not amend the HVNL. Instead develop operational guidance and training.*

***NTC proposal 3: Adopt Option 1: Amend Section 570 of the HVNL to ensure information about past journeys may be required.***

***The NTC considers that this amendment does not extend the current power but does remove ambiguity and the potential risk that the evidence of past journeys may be challenged in court.***

### Questions (continued)

- 4) If the NTC's proposal 3 was adopted, and Section 570 of the HVNL was amended to ensure information about past journeys may be required, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.

## 5.6 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 to identify a third party who holds the documents or information.

Sometimes a third party, such as a service provider of a responsible party, may hold documents or information which would provide evidence of a suspected offence against the HVNL. Examples include telematics information about an operator's vehicle held by an operator's telematics service provider relevant to a fatigue offence; or speed-limiter compliance data relevant to a vehicle standards or primary duty breach. The responsible person may not keep this information. Investigators may be aware of the existence of the information but not know who is holding it. One 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.

Adoption of this proposal would result in information relevant to an offence under the HVNL being able to be obtained from the third party either under a warrant or under the new investigation power.

#### **Advantages**

- would enable the identification of third parties who hold documents or information relevant to the investigation of suspected offences under the HVNL.

#### **Disadvantages**

- requires responsible persons to divulge the details of third parties who have no statutory obligations under the HVNL
- raises human rights, procedural fairness and natural justice considerations.

#### **Options for consideration:**

*Option 1: Amend Sections 569 and 570 of the HVNL to require responsible persons to identify third parties who hold documents or information relevant to the investigation of an offence.*

*Option 2: No change. Do not amend the HVNL.*

**NTC proposal 4: Adopt Option 2: No change. Do not amend the HVNL.**

***The NTC considers the potential human rights, procedural fairness and natural justice concerns accompanying Option 1 outweigh the identified advantages of a change.***

#### **Questions (continued)**

- 5) If the NTC's proposal 4 was adopted, and there was no change to the HVNL, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view

# 6 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. This creates complexity which may lead to incorrect use of powers, which in turn may cause evidence gathered to be inadmissible in court and result in a prosecution failing.
- This chapter examines suggestions to simplify the powers, for example using the model WHS Act as a model, or alternatively to deal with problems that are identified on a provision by provision basis. The chapter also examines two proposals to amend existing powers to address gaps which 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 chapter 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).

## 6.1 Existing legal framework

The table below shows the HVNL powers of entry, search, inspection and seizure; where they can be exercised; and for what purpose.

Section of HVNL	Type of power	Where	Purpose
<b>495 Power to enter relevant place</b>	Entry - with consent or if open for business	Relevant place - Business premises, garage address, base, record location. If attended.	Monitoring
<b>496 General powers after entering relevant place</b>	Inspection - inspect, look, copy, photograph	Relevant place - If attended.	Monitoring
<b>497 General power to enter places</b>	Entry - with consent; or a public place that is open; or under warrant; or a relevant place that is open for business; or if authorised under s.498 or s.499	Place – If attended	Investigation
<b>498 Power to enter a place if evidence is suspected to be at the place</b>	Entry - if open for business	Place - If attended	If reasonable belief that there is/was a heavy vehicle there; or transport or journey documentation is there; and evidence may be concealed or destroyed if the place is not immediately entered and searched
<b>499 Power to enter particular places if incident</b>	Entry – Without consent; or warrant. Only by a police officer if death or injury are involved	Place - If attended; or if unattended,	If reasonable belief that an incident involving death, injury or property damage involves/may have involved a

involving death, injury or damage occurs		with consent or warrant	heavy vehicle, and an offence against the HVNL, and there is a connection between the place and the vehicle, and evidence of the HVNL offence may be concealed or destroyed if the place is not immediately entered and searched
<b>500 General powers after entering a place</b>	Search – Where entered under s.497. Includes film, take a thing or sample for examination, copy document, download data, take a document away to copy	Place	Investigation
<b>520 Power to enter and inspect heavy vehicles for monitoring purposes</b>	Entry and inspection – Includes inspect, examine, film, copy document, make image of electronic document or take device away to make image, copy readout or download data from a device	Vehicle	Monitoring
<b>521 Power to enter and search heavy vehicle involved, or suspected to be involved, in an offence etc.</b>	Entry – With reasonable help and force. Only by a police officer if death or injury are involved  Search – Search vehicle, equipment or load for evidence of HVNL offence; inspect, examine or film, search for and inspect a document, device or thing; take a copy/extract of a document or download from a device; copy a document or take it away to copy, including electronic document and the device it is in	Vehicle	Investigation If reasonable belief the vehicle is or was used to commit an offence against the HVNL; the vehicle or thing in it may provide evidence of an HVNL offence; or the vehicle has or may have been involved in an incident involving death, injury or property damage.
<b>545 Seizing evidence at a place that may be entered without consent or warrant</b>	Seizure – Anything, if reasonable belief the thing is evidence of an offence against the HVNL.	Place	Where entry may be made without consent and without a warrant
<b>546 Seizing evidence at a place that may be entered only with consent or warrant</b>	Entry by consent - Seizure – anything, if reasonable belief the thing is evidence of an offence against the HVNL and seizure is consistent with purpose of entry for which consent has been given.  Entry by warrant – seizure of evidence for which the warrant was issued.  In both cases, anything may be seized that is evidence of a HVNL offence and that may be concealed, destroyed or used to repeat the offence if not seized.	Place	Where entry is made with consent or a warrant
<b>547 Seizing evidence in a heavy vehicle entered under Section 521</b>	Seizure	Vehicle	Where reasonable belief the thing is evidence of an offence against the HVNL.
<b>548 Additional seizure power relating to information stored electronically</b>	Seizure Put information into documentary form and seize document; copy information from the storage device onto another device and seize the second device; seize the original storage device and associated equipment.	Place or vehicle	this cell is empty
<b>549 Seizing thing or sample taken for examination under Section 500</b>	Seizure – Where thing already taken for examination.	N/A	If reasonable belief the thing is evidence of an offence against the HVNL and reasonable belief when thing was taken that it could have been seized.

These distinctions in powers ensure a balance between having appropriate powers for effective enforcement to meet the objects of the HVNL, and protection of the human rights of the persons affected by the exercise of powers.

For example, the general powers after entering a place for *monitoring* purposes under Section 496 of the HVNL are more restricted than the powers after entering a place for *investigation* purposes under Section 500 of the HVNL. Section 496 of the HVNL enables authorised officers to inspect any part of the place or a vehicle on the premises; look for relevant documents and take copies or extracts from them; and look for and inspect relevant devices and download data from them. In

contrast, Section 500 of the HVNL enables an authorised officer to search any part of the place or a vehicle on the premises for evidence of an offence, or for any document or thing related to a heavy vehicle, its equipment or load; to inspect, examine or film anything, to take a thing or sample for examination, and to use reasonable force to exercise these powers.

Another example is the power to film after entry. The powers applying after entry to places for monitoring purposes in Section 496 of the HVNL do not include an ability to film things. However, this power is provided for after entry to places for investigation purposes under Section 500 of the HVNL, and after entry to vehicles for both monitoring and investigation purposes under Sections 520 and 521 of the HVNL, respectively. Monitoring compliance in a place is focused on looking at documents, and copying or taking extracts from the documents is permitted. Filming where no offence is suspected could be seen as invasive. During monitoring, if material comes to light that raises the suspicion of an offence, the investigation powers are enlivened, and the power to film is available. Monitoring compliance of a heavy vehicle has a broader focus, with mass, dimension and load restraint as well as vehicle standards requiring examination of physical aspects of the vehicle. In such cases, the power to film any part of the vehicle and its equipment or load provides contemporaneous evidence of a non-compliance that may otherwise be lost.

## 6.2 Preliminary consultation feedback

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Several enforcement and road transport agencies consulted as part of the preliminary consultation raised concerns that the distinctions in the entry, search and inspection powers described above result in the existing powers in the HVNL being overly complex, creating the risk that authorised officers may inadvertently misuse their powers. This could result in their actions being challenged in court, potentially affecting the admissibility of evidence and prosecution outcomes.

Enforcement and road transport agencies have suggested that simpler provisions consistent with the model WHS Act would reduce these prosecution risks. Similarly, one enforcement agency suggested that a general power of seizure relating to anything an officer reasonably believes is evidence of an offence against the HVNL would be simpler and more consistent with the model WHS Act. However, no comments were provided about whether separate powers in relation to places and vehicles should be retained, or whether the matters governed by the HVNL differed sufficiently from those governed by the model WHS Act to justify the differences in the powers.

In contrast, a number of other enforcement and road transport agencies reiterated the importance of retaining an appropriate balance between enforcement efficiency and human rights, and to ensure that the benefits of any changes are clear.

Further, a number of enforcement and road transport agencies commented that the existing complexities could be adequately managed by the development and use of operational procedures and guidelines. In this context one enforcement agency specifically noted that the existing entry and seizure powers were working well and did not require any changes.

Key industry stakeholders consulted as part of the preliminary consultation were of the view that any additional powers would need to be clearly justified, to be responding to a identified problem, and to be supported by a safety case. In this context, one industry stakeholder commented that it had not seen any evidence to suggest a problem warranting a wide-ranging or more lengthy review of the HVNL investigative and enforcement powers.

In addition, several enforcement agencies have suggested the following specific provisions of the HVNL could be improved:

- Section 521 regarding the power to enter and search a vehicle involved or suspected of being involved in an incident involving death or injury should be amended so that authorised officers who are not police officers are also able to use the power in those circumstances
- Section 522 regarding the power to order the presentation of a heavy vehicle for inspection should be broadened to enable types or classes of vehicles to be called in on the basis of safety concerns and to increase from 30 to 60 days the timeframe in which the vehicle has been used on a road.

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

This section considers a number of options to address stakeholder concerns regarding the complexity of the HVNL powers of entry, search and seizure. A road transport agency has suggested the model WHS Act provisions may provide a useful example of an alternative, simpler approach. The following table compares the model WHS Act and HVNL powers of entry, inspection, search and seizure.

Power	Model WHS Act	HVNL
Power to enter	<p><b>163 Powers of entry</b> (enter workplace with, or without consent; enter any place with warrant)</p> <p><b>164 Notification of entry</b> (must notify as soon as practicable after entry upon entry, unless to do so would defeat the purpose for which the place was entered or cause unreasonable delay)</p>	<p><b>495 Power to enter relevant place</b> (for monitoring, with consent or if open for business)</p> <p><b>497 General power to enter places</b> (investigation, with consent; or a public place that is open; or under warrant)</p> <p><b>498 Power to enter a place if evidence suspected to be at the place</b> (investigation; if open for business)</p> <p><b>499 Power to enter particular places if incident involving death, injury or damage</b> (investigation; with warrant or without consent, unless unoccupied, then requires consent or warrant)</p> <p><b>520 Power to enter and inspect heavy vehicles for monitoring purposes</b> (monitoring)</p> <p><b>521 Power to enter and search heavy vehicle involved, or suspected to be involved, in an offence etc.</b> (investigation)</p>
Power to inspect	<p><b>this cell has intentionally been left empty</b></p>	<p><b>496 General powers after entering relevant place</b> (for monitoring)</p> <p><b>520 Power to enter and inspect heavy vehicles for monitoring purposes</b> (for monitoring)</p>
Power to search	<p><b>165 General powers on entry</b> (inspect, examine, make inquiries; take measurements, conduct tests, make sketches or recordings; take a sample of any substance or thing; exercise any compliance power or other power)</p> <p><b>171 Power to require production of documents and answers to questions</b> (require a person to tell who has custody of, or access to, a document; require that person to produce that document; require a person at the workplace to answer any questions)</p>	<p><b>500 General powers after entering a place</b> (where entered under s.497. Includes film, take a thing or sample for examination, copy document, download data, take a document away to copy)</p> <p><b>521 Power to enter and search heavy vehicle involved, or suspected to be involved, in an offence etc.</b> (investigation)</p>
Power to seize	<p><b>174 Powers to copy and retain documents</b> (make copies of a document; keep that document for as long as necessary.</p> <p><b>175 Power to seize evidence etc.</b> (seize anything at a workplace entered under Section 163 if the inspector reasonably believes the thing is evidence of an offence: seize evidence mentioned in a search warrant at a place entered with search warrant; seize anything else if there is a reasonable belief it is evidence of an offence and seizure is necessary to prevent</p>	<p><b>545 Seizing evidence at a place that may be entered without consent or warrant</b> (anything, if reasonable belief the thing is evidence of an offence against the HVNL)</p> <p><b>546 Seizing evidence at a place that may be entered only with consent or warrant</b> (anything if reasonable belief the thing is evidence of an offence against the HVNL or is consistent with purpose of the warrant; and anything that is evidence of a HVNL offence and that may be concealed, destroyed or used to repeat the offence if not seized)</p> <p><b>547 Seizing evidence in a heavy vehicle</b></p>

	<p>it being hidden, lost or destroyed or used to continue or repeat the offence.)</p> <p><b>176 Inspector's power to seize dangerous workplaces and things</b> (seize workplace, plant or equipment reasonably believed to be defective or hazardous to a degree likely to cause serious injury or illness or a dangerous incident to occur)</p>	<p><b>entered under Section 521</b> (anything where reasonable belief the thing is evidence of an offence against the HVNL)</p> <p><b>548 Additional seizure power relating to information stored electronically</b> (put information into documentary form and seize document; copy information from the storage device onto another device and seize the second device; seize the original storage device and associated equipment)</p> <p><b>549 Seizing thing or sample taken for examination under Section 500</b> (if there is a reasonable belief the thing is evidence of an offence against the HVNL and reasonable belief when thing was taken that it could have been seized)</p>
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**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.**

The model WHS Act powers of entry, search and seizure are relatively simple, and work together as an integrated package.

Section 163 of the model WHS Act allows an inspector to enter, at any time, a place that is, or that the inspector reasonably suspects is, a workplace, and he/she may enter with or without the consent of the person with management or control of the workplace. An inspector may enter any place with a warrant. Section 163 of the model WHS Act is supplemented by:

- Section 165 'General powers on entry'
- Section 171 'Power to require production of documents and answers to questions'
- Section 175 'Power to seize evidence'.

These provisions are set out in full at the Appendix C.

Adoption of this option would involve repeal of the existing HVNL powers of entry, search and seizure and their replacement with provisions mirroring the model WHS Act powers of entry, search and seizure.

However, just as the model WHS Act powers of entry, search and seizure are designed to work together as a package, so too are the powers of entry, search and seizure in the HVNL. It would be a significant change to the HVNL to replace one package for another. Even adopting the model WHS Act powers of entry would entail large-scale amendments to the HVNL. These amendments would entail removing the distinction between places and vehicles, as well as removing the differing requirements depending on whether the power is being exercised for monitoring or for compliance purposes. In addition, the HVNL powers after entry would be affected as they depend on all these distinctions.

Such a significant step would need to be justified by evidence of the specific problems with the existing provisions, evidence that the benefits of the change exceed the costs, and evidence that a non-legislative response, such as the development of operational guidelines, would not achieve the same result as amendments to the law. At this time, examples of the specific problems arising from the existing provisions have not been provided. In addition, it is noted that a number of enforcement and road agencies have indicated their preference for more training and operational guidance on the existing powers.

**Advantages**

- may reduce the risk of authorised officers inadvertently misusing powers, leading to their actions being challenged in court, potentially affecting the admissibility of evidence.
- easier for operators to understand their rights.

**Disadvantages**

- may not adequately address on-road heavy vehicle enforcement
- powers may be too broad for all offences in the HVNL, for example routine monitoring of work diaries; checking a vehicle's mass, dimension or load restraint

- there may be insufficient human rights safeguards relative to the situations where the powers are exercised
- authorised officers may not understand the limits of the powers and may make mistakes that lead to challenges to the use of the powers.

**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.**

The approach of making amendments on a provision by provision basis as evidence of problems are raised by stakeholders is an alternative to the wholesale changes to the HVNL entry, inspection, search and seizure powers proposed in Option 1.

A number of specific issues with existing provisions were raised by enforcement and road transport agency stakeholders during the preliminary consultation. These issues are also considered as part of this discussion paper.

Amending the HVNL as problems are identified ensures the law continues to operate as intended and is efficiently administered. A mechanism for raising and progressing such amendments already exists in the NTC's HVNL Maintenance Advisory Group, which has industry, enforcement agency and road transport agency representatives.

This approach does not preclude reviews of all or parts of the HVNL at 5 or 10 year intervals to ensure the law continues to be relevant and achieve its objects.

**Advantages**

- making amendments as issues are identified by stakeholders ensures the law continues to operate as intended and is effectively administered
- making small amendments is less disruptive and expensive to implement than replacing all the existing entry, inspection, search and seizure powers with similar powers modelled on model WHS Act provisions.

**Disadvantages**

- a piecemeal approach may not produce the same level of benefits as comprehensively simplifying the powers all at one time
- will not result in greater alignment with the model WHS Act

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

Another alternative would be to address the complexity of the HVNL powers of entry, inspection, search and seizure through the development of operational guidance materials and training. This approach was supported by several enforcement and road transport agencies, one of whom has used guidance materials successfully to deal with the current HVNL.

**Advantages**

- capitalises on authorised officers' experience and enforcement agencies' HVNL training efforts to date
- will promote consistent outcomes and help address gaps in understanding
- reduces the potential for failed prosecutions due to incorrect exercise of powers.

**Disadvantages**

- complexities in the HVNL may not be adequately addressed
- mistakes which render evidence inadmissible may still occur.

**Options for consideration:**

*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.*

**NTC proposal 5: Adopt 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; and Option 3: Use operational guidance and training to address complexities.**

**The NTC considers that adopting Options 2 and 3 ensures that the HVNL continues to operate as intended and appropriately balances the interests of industry and enforcement agencies.**

### Questions (continued)

- 6) If the NTC's proposal 5 was adopted, and changes were made to the HVNL entry, inspection, search and seizure powers on a provision by provision basis as evidence of issues are provided by stakeholders; with operational guidance and training also being developed what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.

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

Section 499 of the HVNL provides an authorised officer with the power 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.

Under Section 499 of the HVNL only authorised officers who are police officers can enter *a place* in relation to an incident that involves death or injury to a person. This power requires all four preconditions to be satisfied and is likely only to be used where there has been a serious crash.

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 in relation to an incident that involves death or injury to a person.

Several enforcement agencies have identified the need for amendments to one or both sections because problems arise when this restriction is applied in the context of heavy vehicle crashes on roads in remote areas. In particular, there are concerns:

- police officers may not always be available to attend such heavy vehicle crash scenes and authorised officers who are not police officers may be first on the scene
- 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.

It appears that an authorised officer who is not a police officer could enter where there has been a death or injury, if he or she is assisting the police with police investigations. The police are likely to be investigating the causes of the death or injury rather than an HVNL offence. However, an amendment to the HVNL would be necessary if authorised officers who are not police officers are to be allowed to investigate the HVNL offence in their own right, rather than as assistants to police.

To address these issues, enforcement agency stakeholders have suggested that the word 'injury' should be defined in law as being restricted to 'serious' injury, or an injury not requiring attendance at hospital or admission to hospital. However, defining 'serious injury' may be difficult, and it may

be difficult in practice for an authorised officer to know whether a person has attended hospital or has been admitted to hospital at the time he or she is attending an incident.

As another alternative, enforcement agency stakeholders suggested Sections 499 and 521 of the HVNL could be amended to include a defined time limit following which authorised officers who are not police officers could attend. For example, once any deceased or injured persons are removed; or the police crash scene investigation has concluded.

The NTC suggests another mechanism could be to allow discretion, for example, by approval of the relevant commissioner of police for authorised officers who are not police officers to enter the place or the vehicle.

In addition, enforcement agency stakeholders suggested that the role of authorised officers who are not police officers but who are present at the scene prior to the police attending should be clarified. The NTC suggests this could be managed by operational guidance and agreements between police forces and the NHVR. For example, authorised officers who are not police officers could secure the scene but not enter the vehicle except if necessary to assist or evacuate injured persons. The relevant commissioner may make approval for authorised officers who are not police officers to enter the place or vehicle conditional on compliance with the guidelines.

However, enforcement agency stakeholders have suggested that developing guidance materials without legislative amendment will not resolve the limitation in section 521 of the HVNL which prevents authorised officers who are not police officers from being able to enter places or vehicles to investigate HVNL offences where there is death or injury. Although such materials could clarify the role of authorised officers who are not police officers and who arrive on the scene before police officers. This may improve the ability to gather evidence of HVNL offences at the same time as the police investigation. Cooperation between the NHVR and police forces would be critical in developing such guidance.

These options can be summarised as follows:

**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

#### **Advantages**

- clarifies an operational issue regarding the interaction of serious criminal/traffic and HVNL investigations
- improves investigation and enforcement of offences under multiple laws arising from one incident
- operational guidance will reduce risk of unintended interference with a crime scene and assist gathering of evidence of HVNL offences.

#### **Disadvantages**

- by providing flexibility, roles and priorities may become unclear
- agreement on guidelines may be difficult to achieve
- evidence of serious criminal/traffic offences may be compromised by the involvement of authorised officers who are not police officers.

#### **Options for consideration:**

*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.

**NTC proposal 6: Adopt 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; and Option 3: Develop operational guidance to assist authorised officers and police in applying section 521 of the HVNL.**

**The NTC considers that adopting Options 2 and 3 will reduce the risk of unintended interference with a crime scene and assist gathering of evidence of HVNL offences.**

### Questions (continued)

- 7) If the NTC's proposal 6 was adopted and section 521 of the HVNL was amended to only allow authorised officers who are not police officers to enter a vehicle once police give permission; with operational guidance also being developed to assist authorised officers and police in applying section 521 of the HVNL, what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.

## 6.5 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 it has been used on a road in the preceding 30 days or will be used on a road, and the officer also reasonably believes the driver has not complied with the HVNL in driving the vehicle, or the vehicle does not comply with the HVNL, or is defective.

One enforcement agency has proposed the HVNL be amended to broaden the existing power to require a vehicle to be produced for inspection to include the power to require a fleet or class of vehicles to be produced for inspection. This enforcement agency considers that this is currently not possible under the HVNL and that an authorised officer must first see the vehicle before forming a reasonable belief that a vehicle needs to be inspected. This enforcement agency 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 proposed amendments would enable authorised officers to:

- require a fleet of vehicles or all vehicles of a class of vehicle with a known safety defect to be produced for inspection (whether or not they had been seen), and that this would have road safety benefits
- use evidence provided more than 30 days after a vehicle had been used on a road that showed the vehicle did not comply with the HVNL or was defective, for example telematics data provided as the result of a monthly report which showed a persistent pattern of speeding, indicating a speed limiter had been removed.

These options can be summarised as follows:

**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 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.

### Advantages

- heavy vehicles of a particular operator's fleet or a class of vehicle which is known to be affected by a safety issue could be required by the NHVR to be produced for inspection, producing road safety benefits

- extending the timeframe to 60 days would provide greater flexibility to the NHVR to deal with safety issues in specific known vehicles that come to light more than 30 days after the fault is originally detected.

#### **Disadvantages**

- the operator of a vehicle in a specified class of vehicles may not realise a heavy vehicle it operates is in that class and is therefore required to be produced, rendering the operator liable to a penalty for contravening the requirement. (However, it is noted this issue could be addressed by providing a reasonable excuse defence in this situation.)
- the cost to an operator of producing its fleet or all its vehicles of a class of vehicle for inspection may be significant, and if many vehicles in its fleet were captured, it could significantly affect an operator's business
- in relation to requiring a class of vehicles to be produced, it may not be appropriate for the NHVR to undertake what may be seen as product recall. This is the role of the Australian Competition and Consumer Commission (ACCC). As an alternative, a closer working relationship between the NHVR and the ACCC could address this issue so that the ACCC could be made aware of issues and then decide whether to use its recall powers.

#### **Options for consideration:**

*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 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.*

***NTC proposal 7: Adopt Option 1: Amend Section 522 to change the 30 day limit to 60 days; and Option 2: Amend Section 522 to ensure that a fleet or class of vehicles can be required to be produced without 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.***

***The NTC considers that adopting Options 1 and 2 will provide authorised officers with appropriate power to deal with known safety issues affecting a larger group of vehicles.***

#### **Questions (continued)**

- 8) If the NTC's proposal 7 was adopted and section 522 of the HVNL was amended 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, 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, what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.

## 7 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 indicates that a number of existing sanctions such as formal warnings and improvement notices are not being utilised to their potential.
- Some stakeholders consider that the HVNL may benefit from the introduction of additional enforcement measures such as authorised officer prohibition notices and adverse publicity orders.

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.

### 7.1 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/Regulator orders - HVNL	Authorised officer/Regulator order - Model WHS Act	Court order - HVNL	Court power - Model WHS Act
Improvement notices	YES	YES	–	–
Prohibition notices	NO	YES	YES	NO
Embargo notices/ Non-disturbance notices	YES	YES	–	–
Infringement notices	YES	YES	–	–
Formal warnings	YES	NO	–	–
Adverse publicity orders	–	–	NO	YES
Restoration orders	–	–	NO	YES
Injunctions	–	–	NO	YES
Enforceable undertakings	YES	YES	NO	YES
Commercial benefits orders	–	–	YES	NO
Cancellation or suspension of vehicle registration	–	–	YES	NO
Supervisory intervention order/ WHS project orders & training orders	–	–	YES	YES
Compensation orders	–	–	YES	NO

## 7.2 Preliminary consultation feedback

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Several road transport agencies have stated that they often use improvement notices as a means of requiring operators to address systems failures that cause or contribute to significant compliance failures. However, other agencies stated that they did not use, or only rarely used, improvement notices as an enforcement sanction. In this context, one road transport agency stated that although improvement notices achieve effective results, they are resource-intensive in their use.

### **Authorised-officer-issued prohibition notices**

One enforcement agency supported the introduction of an authorised-officer-issued prohibition notice similar to that available under the model WHS Act, which would prohibit a person from carrying on an activity in a specified way. This agency considered that this would enable an authorised officer to immediately prevent ongoing offending, systemic failures, or severe risks to safety caused by a particular activity. Similarly, a road transport agency also supported the introduction of authorised officer prohibition notices and considered that they could be issued where there were reasonable grounds to believe that a person was not suitable to undertake a role within a transport operation. This agency proposed that as a safeguard there could be a process for an affected person to seek review of the decision by a more senior officer within the agency.

### **Formal cautions**

Another enforcement agency proposed that authorised officers should have the power to issue 'formal cautions' to allow for broader application and discretion in instances where there are minor contraventions of the HVNL that are worthy of enforcement action. Formal cautions would differ from formal warnings in that authorised officers would not have to establish that the person had taken reasonable steps to prevent the contravention because they were unaware of the contravention. The model WHS Act does not provide for either formal warnings or formal cautions to be issued by authorised officers.

### **Court-issued injunctions**

One road transport agency considered that the courts should be empowered to issue an injunction requiring a person to either cease contravening the HVNL or to compel a person to comply with a notice issued by an authorised officer, for example an improvement notice. This agency noted that enforcement agencies are sometimes required to prosecute breaches of notices issued under the HVNL, taking significant time and effort, with potentially detrimental effect where there is serious, persistent and ongoing non-compliance or serious, unrectified safety breaches. This agency suggested that in such circumstances court applications should be able to be made for an injunction to stop misconduct that threatens the safety of other persons or puts valuable assets at risk.

### **Adverse publicity orders**

Other road transport agencies supported the adoption of adverse publicity orders similar to that provided for in Section 236 of the model WHS Act, as set out in Appendix C. It is suggested that such a provision would be a deterrent to non-compliance and a reward for good behaviour. However, several industry stakeholders cautioned the need for procedural fairness and to ensure that the publication of court outcomes did not occur before the completion of court processes.

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

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A number of enforcement and road transport agency stakeholders consider that the HVNL may benefit from the introduction of additional sanctions such as those included in the model WHS Act.

### **Option 1: Authorised-officer-issued prohibition notices.**

Part 10.3 Division 6 of the HVNL deals with the power of the courts to make a prohibition order prohibiting a convicted person, for a stated period of not more than 1 year, from having a stated role or responsibility associated with road transport. In particular, Section 606 of the HVNL provides that a prohibition order may be issued where a court:

- convicts a person of an offence against the HVNL; and
- considers the person to be, or likely to become, a systematic or persistent offender with regard to the circumstances of offences against the HVNL and previous corresponding laws for which the person has previously been convicted.

Significantly, Section 607 of the HVNL also provides that a court may not make a prohibition order prohibiting the convicted person from driving a vehicle or having a vehicle registered or licensed under an Australian road law in the convicted person's name.

Unlike the HVNL, where prohibition orders are issued by the courts only, under the model WHS Act an inspector can issue a prohibition notice prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, if they reasonably believe that:

- an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or
- an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

Accordingly, there are differences in the types of persons authorised to issue prohibition notices under the HVNL and under the model WHS Act. There are also differences in the objectives of the prohibition notice provisions. Under the HVNL the objective of the court-imposed prohibition order is to prohibit a person from operating in the road transport industry for a specified period of time, where that person is considered to be, or to be likely to become, a systematic or persistent offender. In contrast, the objective of the prohibition notice provisions under the model WHS Act is to immediately stop an activity that poses an imminent risk to the health or safety of a person.

However, these differences do not mean that under the HVNL, authorised officers cannot take action to stop immediate risks. For example, where a vehicle is in breach of a mass, dimension or load restraint requirement, Sections 533, 534 and 535 of the HVNL empower an authorised officer to direct the driver or operator of a heavy vehicle to rectify any minor, substantial or severe breaches. The effect of these directions powers therefore may include preventing the vehicle proceeding further until the vehicle is made compliant. Likewise, where a driver has exceeded work-hour limits, Sections 538, 539 and 540 of the HVNL empower an authorised officer to require a driver to immediately rest for a stated period in accordance with a minimum rest requirement and to work for a stated shorter period when the driver next works to compensate for the excess period worked. The practical effect of these requirements is that the driver is grounded until the necessary period of rest has been completed. Where, following an inspection, an authorised officer reasonably believes there is a defective heavy vehicle, Section 526 of the HVNL provides that the authorised officer may, if the vehicle poses an imminent and serious safety risk, issue a major defect notice, the practical effect being that the vehicle cannot be used on a road until the defects are rectified.

#### ***Advantages***

- provides for immediate intervention and action
- motivates compliance as the notice remains in force until an authorised officer is satisfied the matters that give or will give rise to the risk have been remedied.

#### ***Disadvantages***

- may be unnecessary – powers to stop a heavy vehicle in relation to vehicle standards, mass, dimension and load restraint, and fatigue already exist under the HVNL
- may impact on the ongoing viability of road transport businesses
- confusion may be created for both enforcement agencies and industry if the HVNL is amended to include both prohibition orders and prohibition notices.

#### **Option 2: Formal cautions in addition to formal warnings.**

A formal warning is provided as an alternative sanction to taking proceedings against a person for a contravention of a law in limited circumstances. Under Section 590 of the HVNL, an authorised officer may issue a formal warning if they reasonably believe:

- a person has contravened the HVNL

- the person had taken reasonable steps to prevent the contravention and was unaware of the contravention
- the contravention may appropriately be dealt with by way of a warning.

Some road transport and enforcement agencies have raised concerns that these requirements make it difficult to use formal warnings. Accordingly, one enforcement agency has proposed that in addition to formal warnings authorised officers be empowered to issue 'formal cautions' to allow for broader application and discretion in instances where there are very minor contraventions of the HVNL that are nevertheless worthy of enforcement action.

#### **Advantages**

- removes the requirement for an authorised officer to prove that a person had taken reasonable steps to prevent the contravention.

#### **Disadvantages**

- may unnecessarily duplicate formal warnings
- may create confusion for both enforcement agencies and industry if the HVNL is amended to include both formal cautions and formal warnings
- may be of limited practical benefit.

### **Option 3: Court-issued injunctions.**

Injunctions are an important enforcement tool under other legislative regimes for compelling a person to modify their behaviour. Option 3 would involve amending the HVNL to provide for court-issued injunctions in a similar manner to Section 215 of the model WHS Act.

Under Section 215 of the model WHS Act, the regulator may apply to the court for an injunction compelling a person to comply with a notice or restraining a person from contravening a notice. This includes non-compliance with a non-disturbance, improvement or prohibition notice. Significantly, the regulator may apply for the injunction regardless of whether or not proceedings have been brought against the person in relation to the matter to which the notice was issued, and whether any period for compliance with the notice has expired. In addition, under Section 240 of the model WHS Act, where a court finds a person guilty of an offence it may issue an injunction requiring the person to cease the contravention of the Act.

Under the model WHS Act an injunction is likely to be sought when there are exceptional, pressing or urgent circumstances. For example, where the breach involves a significant risk to public safety. In addition, injunctions may be sought where a serious risk has not been remedied by the person to whom the notice has been issued and other mechanisms available to the regulator have not resulted in compliance being secured. Injunctions therefore provide a timely means for the regulator to ensure that breaches and health and safety risks are addressed, rather than having to wait for the lengthy process of prosecution.

However, the HVNL does not include any such injunction measure. Indeed, the current HVNL sanctions provide no power for a court to require a person to cease contravening the HVNL or to require compliance with an authorised-officer-issued notice.

Instead, Section 557 of the HVNL empowers authorised officers to issue embargo notices where a thing is to be seized but cannot, or cannot readily, be removed. In addition, Section 572 of the HVNL empowers an authorised officer to issue an improvement notice where an authorised officer reasonably believes a person has contravened or is contravening a provision of the HVNL in circumstances that make it likely that the contravention will continue or be repeated. Breach of either an embargo notice or improvement notice carries a maximum penalty of \$10,000. Further action can also be taken against a person subject to an improvement notice for the contravention to which the notice applies, if the person either fails to comply with the notice or the notice is revoked.

However, short of prosecuting the person for the offence, there are no other powers available to an authorised officer under the HVNL to stop non-compliance.

#### **Advantages**

- allows timely restraint of non-compliance
- avoids having to wait for the outcome of the prosecution process.

#### **Disadvantages**

- may be an unnecessary additional power.

#### **Option 4: Adverse publicity orders.**

Adverse publicity orders involve the publication of details of an offender's conviction and other relevant facts, such as the nature and consequences of the offence, to either a specific group of people or to the general public.

Adverse publicity orders damage reputation and affect consumer confidence. These consequences also serve to punish and may be a deterrent to re-offending. Adverse publicity orders also operate to inform others about the conduct so that they can assess the risk of doing business with the offender.

Sections 234 and 236 of the model WHS Act provide that where a court convicts a person or finds a person guilty of an offence, the court may make an adverse publicity order in relation to the person, requiring the person to publicise the offence, its consequences, the penalty imposed and any other related matter.

#### **Advantages**

- negative publicity to a duty holder's reputation and business may encourage compliance in circumstances where monetary penalties have been unsuccessful
- draws public attention to breaches by a company
- warns potential commercial partners about the risk of doing business with the convicted person
- has the potential to change consumer behaviour
- negative publicity may attract further scrutiny and investigation by regulatory agencies

#### **Disadvantages**

- may impact the ongoing viability of a business.

The NTC notes that many of the advantages of adverse publicity orders may also be achieved by publishing court outcomes, as explored in Chapter 7 below.

#### **Options for consideration:**

*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).*

#### **NTC Proposal 8: Adopt 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)***

***The NTC considers that adopting Option 3 will provide a timely means to ensure that breaches of notices under the HVNL are addressed.***

#### **Questions (continued)**

- 9) If the NTC's proposal 8 was adopted and the HVNL was amended 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) what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.

## 7.4 Is there a need to publish enforcement action outcomes?

Publicising the outcomes of prosecutions and court-imposed sanctions is one way to give comfort to compliant operators that non-compliant parties are being dealt with by enforcement agencies. 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.

Publishing court outcomes would include publishing details of the penalties imposed and orders and undertakings made, including compensation orders, prohibition orders, supervisory intervention orders and commercial benefits penalty orders.

### **Advantages**

- personal details of the company can be kept confidential if desired
- draws public attention to areas of concern in the heavy vehicle industry
- has the potential to change consumer behaviour
- raises the profile of heavy vehicle breaches.

### **Disadvantages**

- potential additional costs to enforcement agencies and the NHVR in providing and collecting this information
- information published may be the subject of appeal.

### **Options for consideration:**

*Option 1: Either through administrative processes or an amendment to the HVNL, require the NHVR to publish court outcomes including penalties imposed.*

*Option 2: No change.*

***NTC Proposal 9: Adopt Option 1: Either through administrative processes or an amendment to the HVNL, require the NHVR to publish court outcomes including penalties imposed.***

***The NTC considers that adopting Option 1 will raise awareness of heavy vehicle breaches and may lead to changes to non-compliant behaviour.***

### **Questions (continued)**

- 10) If the NTC's proposal 9 was adopted and, either through administrative processes or an amendment to the HVNL, the NHVR was required to publish court outcomes including penalties imposed, what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.

# 8 Evidentiary issues

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## Key points

- The admissibility of evidence is key to successful prosecutions. Evidence can be challenged on many grounds, including that the evidence was improperly or illegally obtained. There is a risk of this type of challenge where police use police powers rather than HVNL powers to obtain evidence of HVNL offences.
- This chapter considers the need for an evidentiary provision that would clarify that evidence obtained legally by police is admissible, or whether guidance material and training could resolve any problems.
- The HVNL contains many evidentiary aids that provide that something is prima facie evidence of what it is stated to be, for example whether a weighing device was in proper condition and had a stated level of accuracy at a stated time.
- This chapter also examines the need for an evidentiary provision relating to vehicle standards breaches for heavy vehicles detected travelling at or above 115 km/h.

This chapter 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.

## 8.1 Existing legal framework

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### Police and authorised officer powers

The regulatory impact statement for the original HVNL stated that the HVNL 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.

The HVNL therefore expressly provides for police to be declared as HVNL authorised officers and states and territories have done this through their own application Acts.

Recognising the broader enforcement role of police, Section 491 of the HVNL prohibits HVNL authorised officers from the use of force against persons, but allows each jurisdiction to give this power to its police. Section 492 of the HVNL also prohibits HVNL authorised officers from the use of force against property unless the HVNL authorised officer is a member of the police or a jurisdiction has given this power to its HVNL authorised officers who are not police.

In addition, the HVNL recognises that HVNL authorised officers who are police may exercise powers under other laws. For example, Section 418 of the HVNL regarding disclosure of Intelligence Access Program (IAP) information, allows an IAP service provider to give the information to an HVNL authorised officer who is a police officer for law enforcement purposes 'if so authorised by a warrant issued under this Law or another law.'

Some state and territory police Acts also recognise that police exercise similar powers in relation to heavy vehicles under the HVNL. For example, Section 63 of the *Police Powers and Responsibilities Act 2000* (Qld) provides a power to inspect and test vehicles, which can be exercised to 'check whether the vehicle complies with a transport Act or the *Heavy Vehicle National Law Act 2012* (Qld)'. Section 63 of the *Police Powers and Responsibilities Act 2000* (Qld) is therefore an example of a facilitative provision to ensure that statutory functions are not challenged on procedural grounds.

From the preliminary consultation conducted to inform the development of this discussion paper it is understood Queensland police use their police powers when enforcing heavy vehicle offences under the HVNL. In other states and territories, it is understood police use the HVNL powers where

they are available and police powers where they are not. For example, it is understood that South Australian police use the power of arrest under Section 75 of the *Summary Offences Act 1953* (SA).

### **Admissibility of evidence**

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 will depend on the offence, the circumstances of the offence and how the evidence was obtained.

In this context, several states and territories now have statutory provisions expressly addressing the issue of improperly or illegally obtained evidence. For example, Section 138 of the *Evidence Act 1995* (NSW) and Section 138 of the *Evidence Act 2008* (Vic) allow the court to use its discretion to determine whether evidence should be admitted if certain criteria are met. In NSW, the Court of Criminal Appeal held in *R v Workman* [2004] NSWCCA 213 that evidence obtained interstate, in compliance with interstate law, but not in compliance with NSW law, is not illegally or improperly obtained evidence within the meaning of Section 138 of the *Evidence Act 1995* (NSW).

Case law also helps determine the admissibility of evidence where it is alleged to have been obtained improperly because an incorrect power was used, for example, South Australian cases *Police v Owens* [2007] SASC 118; *Police v Grozev* [2006] SASC 353; and *SA Police v Hall* [1997] 25 MVR 320. These cases support the proposition that even if police exercise an incorrect power, as long as a power to support the action exists, the evidence obtained will be admissible.

### **Evidence by certificate**

Sections 711 to 714 of the HVNL enable the NHVR, road authorities and authorised officers to tender certain information to the court by certificate.

Evidence provided by certificate under these sections is often information extracted from registers of heavy vehicles or other records maintained by the NHVR or road authorities. These relate, for example, to matters such as category or type of heavy vehicle, name and address of registered operator and other matters that are likely to be non-contentious, including the condition of instruments that have been used to detect an offence.

These evidentiary certificates are for administrative convenience. However the defence can challenge matters stated in a certificate.

In addition, the current reverse onus-of-proof provisions of the HVNL also provide that evidence of a court convicting a person of a heavy vehicle offence, or evidence of details stated in an infringement notice, are evidence that the offence happened at the time and place and in the circumstances detailed. The effect of this evidentiary provision is that in a proceeding for an offence against the HVNL the prosecution does not have to prove the time, place and circumstances of the offence. The reverse onus-of-proof provisions will be removed as part of the 2016 Amendment Bill as such provisions are incompatible with a positive duty and outcomes-based approach to managing safety risks. However, the evidentiary provision will be retained.

## **8.2 Preliminary consultation feedback**

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In the preliminary consultation, an enforcement agency identified a need for a provision that deals with the admissibility of evidence obtained under state and territory police powers that are not in the HVNL. A road transport agency also suggested protocols should be developed to clarify the interaction of police and HVNL powers and exactly what HVNL authorised officers who are police and HVNL authorised officers who are not police can do.

## 8.3 Is there a need to clarify the admissibility of evidence obtained 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: A facilitative evidentiary provision.

A facilitative provision could be added to the HVNL to clarify that evidence obtained using police powers is admissible, provided such evidence is lawfully obtained. This would eliminate uncertainty about the interaction of police and HVNL powers.

#### Advantages

- would clarify issues of priority of evidence gathered by police using police powers not in the HVNL
- would resolve any potential conflict between the admissibility of evidence obtained by the use of HVNL or police powers
- may reduce court time.

#### Disadvantages

- admissibility of evidence is a matter for the courts
- may create conflicts with general laws of evidence
- may be unfair to the defendant.

### Option 2: Operational guidance/training.

As an alternative, operational training and guidance could be developed by the NHVR to clarify the status of evidence lawfully obtained using police powers. This guidance could also clarify the use of HVNL powers by police and HVNL authorised officers who are not police, to minimise the risk of incorrect powers being used that might result in evidence being inadmissible.

#### Advantages

- can include examples and explain particular situations
- allows flexibility
- does not have the same effect as law.

#### Disadvantages

- may create confusion if in conflict with the general laws of evidence.

#### Options for consideration:

*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.*

**NTC proposal 10: Adopt Option 2: That the NHVR develop operational guidance and training clarifying the evidentiary status of evidence lawfully obtained using police powers.**

**The NTC considers that adopting Option 2 would minimise the risk of incorrect powers being used.**

#### Questions (continued)

- 11) If the NTC's proposal 10 was adopted and operational guidance and training was developed by the NHVR clarifying the evidentiary status of evidence lawfully obtained using police powers, what would be the impact on your business/agency or the way in which you conduct your operations. Please explain the reasons for your view.

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

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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.

### Context

In early 2016 the NTC conducted a review, including the release of a discussion paper, to assess two proposals submitted by stakeholders 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).

Stakeholders were divided in their support for the proposals and in their views on the effectiveness of the current suite of speed-compliance tools. In addition, there was inconsistency across submissions in the understanding of how the evidentiary provision under proposal 1 could work in practice.

Based on the stakeholder submissions received; the broader context of heavy vehicles and road reform, including efforts being undertaken to improve road infrastructure, provide more rest areas and reduce the age of the heavy vehicle fleet; as well as having regard to the COAG *Principles of Best Practice Regulation*, the NTC recommended no changes be made to the HVNL.

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

The proposal made by the road transport agency is for the HVNL to be amended 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. To support this proposal, the road transport agency has provided the following information.

### Supporting information from road transport agency

The road transport agency proposes that further consideration be given to amending the HVNL to include a legislative mechanism to ensure a heavy vehicle detected speeding at 115km/h or more, is mechanically compliant without necessitating a physical inspection.

The road transport agency has suggested that the proposed evidentiary provision would deem the speed limiter non-compliant where the vehicle is found to be travelling at excessive speed. Such a provision could then allow for an observed speed of 115km/h or more to be used as a basis for taking action to ensure that the vehicle is mechanically compliant.

The road transport agency suggests the inclusion of such an evidentiary provision provides a number of advantages including:

- physical inspection of the device by authorised officers would not be required and this would assist authorised officers who do not always have equipment or opportunity to undertake an inspection
- the evidentiary provision would establish facts that would allow remedial action to be taken – for example ensuring that a vehicle is mechanically safe in situations where fixed speed camera technology is used (noting that external factors such as gradient are usually factored in when deciding on the placement of cameras).

The road transport agency maintains this proposal does not introduce a new offence, akin to the speed limiter offence provision preserved in NSW law through Section 162 of the *Road Transport Act 2013* (NSW). Nor that the evidentiary provision would deem that an offence has been committed by any party. Rather, the road transport agency considers that the proposed evidentiary provision would be relied upon to prove the condition of a vehicle. The road transport agency considers that this type of evidentiary provision could assist with remedial measures or, in appropriate circumstances, a prosecution under the HVNL. The road transport agency does however consider that any concerns about reversing the onus of proof should be weighed against:

- the significant safety risk posed by a speeding heavy vehicle, particularly to vulnerable road users
- the observed evidence that the vehicle was being operated when non-compliant
- the ability to rely upon the deemed non-compliance to justify a range of remedial actions as an alternative to prosecution to secure compliance.

In addition, the road transport agency considers that drafting of the evidentiary provision should include consideration of the admissibility of the evidence and that weight that should be given to the relevant evidence, for example whether to prescribe that certain evidence is admissible and not rebuttable as evidence.

### **NTC analysis of the proposal**

An evidentiary provision that deems a speed limiter non-compliant if a heavy vehicle is detected travelling at or above 115 km/h avoids the challenges of determining speed limiter compliance by physical examination. However, the mere act of speeding does not necessarily mean a speed limiter is malfunctioning or non-compliant. There may be other factors that result in the vehicle speeding, for example gradient. Such an evidentiary provision relieves authorised officers and the prosecution of the obligation to prove elements of the offence that are arguably well within their capacity to discover.

In the NTC's view, the effect of such an evidentiary provision is that a driver, operator or any other 'person' may be liable for a breach of Section 60 of the HVNL, concerning compliance with heavy vehicle standards, without the prosecution having to prove the vehicle's speed limiter was defective. This creates a deemed liability provision and places the burden of proof on the driver, operator or other 'person' to rebut the evidential assumption that the vehicle's speed limiter was defective. In the NTC's view this proposal is inconsistent with the positive duties approach agreed as part of the CoR reforms, which includes as part of these reforms the removal of the existing deemed liability provisions. These provisions of the HVNL are to be removed on the basis that such provisions are prescriptive, encourage a box-ticking mentality, and are incompatible with a positive duty and outcomes-based approach to managing safety risks.

#### ***Options for consideration:***

*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.*

***NTC Proposal 11: Adopt Option 2: That no change be made to the law.***

***The NTC does not consider that the introduction of a deeming evidentiary provision proposed in Option 1 is consistent with the positive duties approach taken under the agreed chain of responsibility reforms.***

### **Questions (continued)**

- 12) If the NTC's proposal 11 was adopted and there were no changes made to the HVNL, what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.

## 9 Cross-jurisdictional issues

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### 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.
- Stakeholders have identified the need for clarification about how cross-border offences are investigated and prosecuted, and how information is shared amongst states and territories and enforcement agencies for the purposes of the HVNL.

The heavy vehicle industry operates nationally and CoR 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 and the NHVR can perform its functions it is important that breaches of the HVNL can be investigated and prosecuted across jurisdiction borders. In addition, 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 chapter therefore 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.

### 9.1 Existing legal framework

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#### Investigating and prosecuting cross-border offences

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. Division 1 of Part 12.2 of the HVNL provides for the establishment of the NHVR, and details its functions and powers.

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.’ In addition, 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.

### **Information sharing**

It is essential to have effective and efficient information-sharing systems to support law enforcement and the operational officers who protect our community. This is recognised in Section 660 of the HVNL, which 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.

## **9.2 Preliminary consultation feedback**

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### **Investigating and prosecuting cross-border offences**

As part of the preliminary consultation, an enforcement agency has raised a concern that the cross-jurisdiction application and enforcement of the HVNL can be challenging for enforcement agencies, particularly in relation to the use of evidence and the recognition of authorised officers where these officers are appointed under the application laws of a participating jurisdiction different to the jurisdiction of the enforcement agency.

In this context, a road transport agency has also noted that difficulties often arise where a direction is given by an enforcement agency in one jurisdiction requiring the production of information or documents from a driver or CoR party in another jurisdiction.

### **Information sharing**

One enforcement agency has also highlighted challenges in relation to the sharing of information between states and territories and between states and territories and the NHVR. Although Section 660 of the HVNL empowers the NHVR to ask a government agency of a participating jurisdiction for information required to exercise its functions, it is understood that some jurisdiction agencies are reluctant to provide this information, notwithstanding the protections provided in Section 660 of the HVNL.

In this context, a road transport agency has also highlighted issues with obtaining information from other government agencies, especially if information is held in general databases and the information is personal information. To resolve this issue, the agency has suggested a national data system be developed to enable the sharing of information regarding heavy vehicle offences. This view and suggestion is also supported by another road transport agency, who noted that the development of a national data system is critical for cross-border enforcement and suggested that the establishment of such a data system should be a responsibility of the NHVR.

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

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An enforcement agency has suggested that the state laws of participating states and territories make cross-border investigations and prosecutions of HVNL offences challenging, particularly in

relation to court requirements and restrictions on the initiation of proceedings. There are a number of options to address these issues.

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

An enforcement agency has suggested that amending the HVNL to expressly provide that HVNL matters may be heard in any participating jurisdiction, even if offences were wholly committed in another jurisdiction, would advance national compliance efforts and result in positive nation-wide outcomes. To this end, it has been proposed the HVNL be amended to include a provision equivalent to Section 10C of the *Crimes Act 1900* (NSW). Section 10C provides:

- (1) If:
- (a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and
  - (b) a geographical nexus exists between the State and the offence, the person alleged to have committed the offence is guilty of an offence against that law.
- (2) A geographical nexus exists between the State and an offence if:
- (a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or
  - (b) the offence is committed wholly outside the State, but the offence has an effect in the State.

The effect of adopting a provision similar to Section 10C of the *Crimes Act 1900* (NSW) would be to expressly clarify that a breach of the HVNL in one participating jurisdiction constitutes an offence in another participating jurisdiction, even if the breach only has an effect in the state of commission or has been partially committed in that other state.

**Advantages**

- clarifies that the HVNL is intended to apply nationally, regardless of state and territory borders.

**Disadvantages**

- may not achieve anything greater than is already provided for by Section 16 of the HVNL concerning extraterritorial operation
- may create difficulties for defendants.

**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.**

A facilitative provision could also be inserted into the HVNL to expressly provide that evidence gathered in one jurisdiction is admissible in another jurisdiction provided the evidence is lawfully obtained. This would remove uncertainty about the different requirements and safeguards that states and territories have in relation to evidence.

**Advantages**

- clarifies the status of evidence gathered in one participating jurisdiction where it is to be used in another participating jurisdiction
- avoids court argument about admissibility.

**Disadvantages**

- there is no evidence that there is a problem with the admissibility of evidence gathered in other states and territories within HVNL investigations and prosecutions
- admissibility of evidence is a matter for the courts
- may have unintended consequences and create conflicts with general laws of evidence.

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

To better facilitate cross-border investigations and prosecutions, Option 3 proposes the development of guidance materials and other protocols to clarify the national intent of the HVNL. This would clarify that evidence gathered in one jurisdiction for the purposes of an HVNL

investigation and prosecution is admissible in another jurisdiction provided the evidence is lawfully obtained. Such materials would also clarify the authority of authorised officers appointed in one jurisdiction where they are exercising powers in another jurisdiction.

#### **Advantages**

- a flexible tool that can be readily adapted to changing practices and experiences in investigating and prosecuting HVNL offences
- may help strengthen relationships between the NHVR and enforcement agencies in investigating and prosecuting cross-border offences.

#### **Disadvantages**

- does not have the status and effect of law
- will not resolve admissibility issues.

#### **Options for consideration:**

*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.*

***NTC proposal 12: Adopt Option 3: That the NHVR develop operational guidance material and protocols to clarify cross-border investigations and prosecutions.***

***The NTC considers that adopting Option 3 will assist authorised officers in investigating and prosecuting cross-border offences.***

#### **Questions (continued)**

- 13) If the NTC's proposal 12 was adopted and operational guidance material and protocols were developed by the NHVR clarifying cross-border investigations and prosecutions what would be the impact on your business/ agency or the way in which you conduct your operations. Please explain the reasons for your view.

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

A number of road transport and enforcement agency stakeholders have raised concerns that the HVNL does not provide for the sharing of information between road transport and enforcement agencies from different states and territories, or the sharing of information obtained by the NHVR with road transport and enforcement agencies.

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.

**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.**

Under Option 1, the HVNL could be amended to include a provision that specifically authorises the disclosure of specified information for the purposes of the HVNL between participating government agencies, the Commonwealth and the NHVR.

This provision could be modelled on Section 271 of the *Education and Care Services National Law*, which expressly provides for the disclosure of specified information between specified bodies for

the purposes of that law. Section 271 of the *Education and Care Services National Law* is set out at Appendix D.

As noted above, Section 660 of the HVNL empowers the NHVR to request information from states and territories that may assist the NHVR in exercising its functions. However, the provision is limited and does not allow the NHVR to share information with road transport and enforcement agencies.

#### **Advantages**

- removes any ambiguity in the HVNL
- clarifies in law that specified information can be shared between participating government agencies, the Commonwealth and the NHVR for the purposes of the HVNL.

#### **Disadvantages**

- may be unnecessary because this aim might be adequately addressed through administrative and operational arrangements.

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

As an alternative or in addition to Option 1, one enforcement agency has suggested that the HVNL be amended to designate the NHVR as a 'law enforcement agency' for the purposes of Commonwealth, state and territory information privacy laws. The effect of such an amendment would be to enable the disclosure of personal information for the purposes of the HVNL from and to the NHVR that would otherwise be prohibited from disclosure on privacy grounds.

#### **Advantages**

- allows personal information otherwise prohibited from disclosure to be shared with the NHVR.

#### **Disadvantages**

- may have unintended legal consequences
- may be perceived as unnecessarily extending the functions and powers of the NHVR.

### **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.**

As an alternative or in addition to legislative change, Option 3 proposes the development of operational measures such as MOUs or other protocols to facilitate the sharing of information for the purposes of the HVNL between enforcement agencies, road transport agencies and the NHVR.

#### **Advantages**

- provides operational processes and procedures to facilitate the sharing of information for the purposes of the HVNL
- provides practical guidance and assistance to enforcement agencies in undertaking HVNL investigations
- ensures transparency of process.

#### **Disadvantages**

- may not adequately address the limitations of the HVNL.

#### **Options for consideration:**

*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.*

***NTC proposal 13: Adopt Option 3: That the NHVR develop Memorandums 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.***

***The NTC considers that adopting Option 3 will provide practical guidance and assistance to enforcement agencies in undertaking HVNL investigations.***

**Questions (continued)**

- 14) If the NTC's proposal 13 was adopted and Memoranda of Understanding or other protocols were developed by the NHVR to facilitate the sharing of information for the purposes of the HVNL between enforcement agencies, road transport agencies and the NHVR, what would be the impact on your business/ agency, or the way in which you conduct your operations. Please explain the reasons for your view.

## 10 Next steps

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### Key points

- NTC to revise proposals based on submissions received.
- A policy paper and recommendations arising from this review will be provided to ministers for consideration at their meeting in May 2017.
- If legislative change is required, 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.

If amendments to the HVNL are required, 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.

# 11 Summary of issues and options proposed

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## Key point

- This section summarises the issues and options proposed by the NTC.

## 11.1 Information-gathering powers

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

NTC proposal 1: Adopt Option 3: Maintain current 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 guidelines and training.

The NTC considers that Option 3 provides an appropriate and proportionate balance between human rights and effective enforcement.

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

NTC proposal 2: Adopt Option 1: Amend Section 569 of the HVNL to clarify that electronic documents can be required to be produced in electronic form.

The NTC considers that this amendment will simplify the production of requested documents. It recognises the prevalence of electronic data and considers this change will result in more effective operation of the HVNL.

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

NTC proposal 3: Adopt Option 1: Amend Section 570 of the HVNL to ensure information about past journeys may be required.

The NTC considers that this amendment does not extend the current power but does remove ambiguity and the potential risk that the evidence of past journeys may be challenged in court.

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

NTC proposal 4: Adopt Option 2: No change. Do not amend the HVNL.

The NTC considers the potential human rights, procedural fairness and natural justice concerns accompanying Option 1 outweigh the identified advantages of a change.

## 11.2 Powers of entry, inspection, search and seizure

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

NTC proposal 5: Adopt 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; and Option 3: Use operational guidance and training to address complexities.

The NTC considers that adopting Options 2 and 3 ensures that the HVNL continues to operate as intended and appropriately balances the interests of industry and enforcement agencies.

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

NTC proposal 6: Adopt 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; and Option 3: Develop operational guidance to assist authorised officers and police in applying section 521 of the HVNL.

The NTC considers that adopting Options 2 and 3 will reduce the risk of unintended interference with a crime scene and assist gathering of evidence of HVNL offences.

#### **Is a broader power to require heavy vehicle inspection necessary?**

NTC proposal 7: Adopt Option 1: Amend Section 522 to change the 30 day limit to 60 days; and Option 2: Amend Section 522 to ensure that a fleet or class of vehicles can be required to be produced without 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.

The NTC considers that adopting Options 1 and 2 will provide authorised officers with appropriate power to deal with known safety issues affecting a larger group of vehicles.

### **11.3 Available sanctions and the need for additional remedies**

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

NTC Proposal 8: Adopt 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).

The NTC considers that adopting Option 3 will provide a timely means to ensure that breaches of notices under the HVNL are addressed.

#### **Is there a need to publish enforcement action outcomes?**

NTC Proposal 9: Adopt Option 1: Either through administrative processes or an amendment to the HVNL, require the NHVR to publish court outcomes including penalties imposed.

The NTC considers that adopting Option 1 will raise awareness of heavy vehicle breaches and may lead to changes to non-compliant behaviour.

### **11.4 Evidentiary issues**

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

NTC proposal 10: Adopt Option 2: That the NHVR develop operational guidance and training clarifying the evidentiary status of evidence lawfully obtained using police powers.

The NTC considers that adopting Option 2 would minimise the risk of incorrect powers being used.

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

NTC Proposal 11: Adopt Option 2: That no change be made to the law.

The NTC does not consider that the introduction of a deeming evidentiary provision proposed in Option 1 is consistent with the positive duties approach taken under the agreed chain of responsibility reforms.

### **11.5 Cross-jurisdictional issues**

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

NTC proposal 12: Adopt Option 3: That the NHVR develop operational guidance material and protocols to clarify cross-border investigations and prosecutions.

The NTC considers that adopting Option 3 will assist authorised officers in investigating and prosecuting cross-border offences.

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

NTC proposal 13: Adopt Option 3: That the NHVR develop Memorandums 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.

The NTC considers that adopting Option 3 will provide practical guidance and assistance to enforcement agencies in undertaking HVNL investigations.

# Appendix A: Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (Qld) (Extract)

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## Clause 91 Insertion of new Section – Section 570A

### 570A Requiring information

- (1) This section applies if an authorised officer reasonably believes a person is capable of giving written or oral information—
  - (a) in relation to a possible contravention of a duty under section 26C; or
  - (b) that will assist the authorised officer to monitor or enforce compliance with the duty under section 26C.
- (2) The authorised officer may, by notice, require the person to give the information to the authorised officer.
- (3) If the authorised officer, despite reasonable diligence, has not been able to obtain the information under subsection (2), the authorised officer may, by notice given to the person, require the person to give the information to a person appointed by the authorised officer.
- (4) The notice must state—
  - (a) that—
    - (i) the requirement is made under this section; and
    - (ii) failing to comply with the requirement is an offence; and
  - (b) if the notice requires the person to give written information—the time and way, that is reasonable in the circumstances, in which the person must give the information; and
  - (c) if the notice requires the person to give oral information—
    - (i) the day, time and place, that is reasonable in the circumstances, for the person to appear before the person appointed by the authorised officer; and
    - (ii) that the person may appear with an Australian legal practitioner; and
  - (d) the effect of—
    - (i) subsections (7) and (8); and
    - (ii) section 735A.
- (5) The person must comply with a requirement under this section, unless the person has a reasonable excuse. Maximum penalty—\$10000.
- (6) It is not a reasonable excuse for the person to fail to comply with a requirement made under this section on the ground that complying with the requirement might tend to incriminate the person or make the person liable to a penalty.
- (7) However, the following information is not admissible as evidence against an individual in a civil or criminal proceeding, other than a proceeding for false or misleading information—
  - (a) information that the individual gives in complying with a requirement under this section;
  - (b) information that is directly or indirectly derived from information mentioned in paragraph (a).
- (8) An authorised officer may act under this section only if—
  - (a) for an authorised officer who is a police officer—the officer has the relevant police commissioner's written authority to act under this section; or
  - (b) for an authorised officer who is not a police officer—the officer's instrument of appointment provides that the authorised officer may act under this section.

## Clause 96 Insertion of new Part 10.1A

### Part 10.1A Enforceable undertakings

#### 590A Accepting undertaking

- (1) This section applies if a person contravenes or is alleged to have contravened this Law, other than section 26F.
- (2) The Regulator or an authorised officer (the promisee) may accept an undertaking made by the person in relation to the contravention or alleged contravention.
- (3) The undertaking must be in the approved form.
- (4) The promisee may accept the undertaking only if the promisee reasonably believes the undertaking will ensure the person complies with this Law.
- (5) The promisee may accept the undertaking at any time before the proceeding for the contravention, or alleged contravention, ends.
- (6) If the promisee accepts an undertaking before the proceeding ends, the promisee must use reasonable diligence to have the proceeding discontinued as soon as possible.
- (7) The promisee must give the person written notice of—
  - (a) the promisee's decision to accept or reject the undertaking; and
  - (b) the reasons for the decision.
- (8) If the promisee decides to accept the undertaking and the promisee is not the Regulator, the promisee must give the following documents to the Regulator within 28 days after accepting the undertaking—
  - (a) a copy of the undertaking;
  - (b) a statement of the reasons for the promisee's decision to accept the undertaking.
- (9) The Regulator must publish the following information on the Regulator's website—
  - (a) a promisee's decision to accept an undertaking under this section;
  - (b) the reasons for the decision.
- (10) An authorised officer may act under this section only if—

- (a) for an authorised officer who is a police officer—the officer has the relevant police commissioner’s written authority to act under this section; or
- (b) for an authorised officer who is not a police officer—the officer’s instrument of appointment provides that the authorised officer may act under this section.

**590B Effect of undertaking**

- (1) An undertaking takes effect—
  - (a) when the promisee gives notice of the decision to accept the undertaking to the person who made the undertaking; or
  - (b) at a later time stated in the notice.
- (2) While the undertaking is in effect, the person must comply with the undertaking.  
Maximum penalty—\$10000.
- (3) If the person complies with the undertaking, no proceeding for the contravention or alleged contravention may be taken against the person.
- (4) The offer to make, or the making of, an undertaking is not an admission of guilt by the person offering to make, or making, the undertaking.

**590C Withdrawing or changing undertaking**

- (1) The person who made an undertaking may, at any time, with the written agreement of the promisee—
  - (a) withdraw the undertaking; or
  - (b) change the undertaking.
- (2) However, the provisions of the undertaking may not be changed to provide for a different contravention or alleged contravention of this Law.
- (3) If the promisee is not the Regulator, the promisee must give notice of the withdrawal or change of the undertaking to the Regulator.
- (4) The Regulator must publish notice of the withdrawal or change on the Regulator’s website.

**590D Contravening undertaking**

- (1) The promisee may apply to a relevant tribunal or court for an order if the person who made an undertaking fails to comply with the undertaking.
- (2) If the relevant tribunal or court is satisfied the person has failed to comply with the undertaking, the relevant tribunal or court, as well as imposing any penalty, may make—
  - (a) an order directing the person to comply with the undertaking; or
  - (b) an order discharging the undertaking.
- (3) Also, the relevant tribunal or court may make any other order that the tribunal or court considers appropriate in the circumstances, including an order directing the person to pay to the State—
  - (a) the costs of the proceeding; and
  - (b) the reasonable costs of the promisee in monitoring whether the person complies with the undertaking in the future.
- (4) Nothing in this section prevents a proceeding being taken for the contravention or alleged contravention to which the undertaking relates.

# Appendix B: Heavy Vehicle National Law – Schedule 2 to the Heavy Vehicle National Law Act 2012 (Qld) (Extract)

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## Section 5 HVNL - definition of ‘responsible person’

**responsible person**, for a heavy vehicle, means a person having, at a relevant time, a role or responsibility associated with road transport using the vehicle, and includes any of the following—

- (a) an owner of the vehicle or, if it is a combination, an owner of a heavy vehicle forming part of the combination;
- (b) the vehicle's driver;
- (c) an operator or registered operator of the vehicle or, if it is a combination, an operator or registered operator of a heavy vehicle forming part of the combination;
- (d) a person in charge or apparently in charge of—
  - (i) the vehicle; or
  - (ii) the vehicle's garage address or, if it is a combination, the garage address of a heavy vehicle forming part of the combination; or
  - (iii) a base of the vehicle's driver;
- (e) a person appointed under a heavy vehicle accreditation to have monitoring or other responsibilities under the accreditation, including, for example, responsibilities for certifying, monitoring or approving the use of heavy vehicles under the accreditation;
- (f) a person who provides to an owner or registered operator of the vehicle or, if it is a combination, an owner or registered operator of a heavy vehicle forming part of the combination, an intelligent transport system for the vehicle;
- (g) a person in charge of a place entered by an authorised officer under this Law for the purpose of exercising a power under this Law;
- (h) a consignor of goods for road transport

# Appendix C: Model Work Health Safety Bill (Model Bill 23/6/2011) (Extract)

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## **Powers of regulator to obtain information**

### **155 Powers of regulator to obtain information**

- (1) This section applies if the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of this Act or that will assist the regulator to monitor or enforce compliance with this Act.
- (2) The regulator may, by written notice served on the person, require the person to do 1 or more of the following:
  - (a) to give the regulator, in writing signed by the person (or in the case of a body corporate, by a competent officer of the body corporate) and within the time and in the manner specified in the notice, that information of which the person has knowledge;
  - (b) to produce to the regulator, in accordance with the notice, those documents;
  - (c) to appear before a person appointed by the regulator on a day, and at a time and place, specified in the notice (being a day, time and place that are reasonable in the circumstances) and give either orally or in writing that evidence and produce those documents.
- (3) The notice must:
  - (a) state that the requirement is made under this section; and
  - (b) contain a statement to the effect that a failure to comply with a requirement is an offence; and
  - (c) if the notice requires the person to provide information or documents or answer questions:
    - (i) contain a statement about the effect of sections 172 and 269; and
    - (ii) state that the person may attend with a legal practitioner.
- (4) The regulator must not make a requirement under subsection (2)(c) unless the regulator has taken all reasonable steps to obtain the information under subsections (2)(a) and (b) and has been unable to do so.
- (5) A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section.  
Maximum penalty:  
In the case of an individual—\$10 000.  
In the case of a body corporate—\$50 000.
- (6) Subsection (5) places an evidential burden on the accused to show a reasonable excuse.
- (7) Section 172 (with any necessary changes) applies to a requirement under this section.

## **General powers of entry**

### **163 Powers of entry**

- (1) An inspector may at any time enter a place that is, or that the inspector reasonably suspects is, a workplace.
- (2) An entry may be made under subsection (1) with, or without, the consent of the person with management or control of the workplace.
- (3) If an inspector enters a place under subsection (1) and it is not a workplace, the inspector must leave the place immediately.
- (4) An inspector may enter any place if the entry is authorised by a search warrant.

### **165 General powers on entry**

- (1) An inspector who enters a workplace under section 163 may do all or any of the following:
  - (a) inspect, examine and make inquiries at the workplace;
  - (b) inspect and examine anything (including a document) at the workplace;
  - (c) bring to the workplace and use any equipment or materials that may be required;
  - (d) take measurements, conduct tests and make sketches or recordings (including photographs, films, audio, video, digital or other recordings);
  - (e) take and remove for analysis a sample of any substance or thing without paying for it;
  - (f) require a person at the workplace to give the inspector reasonable help to exercise the inspector's powers under paragraphs (a) to (e);
  - (g) exercise any compliance power or other power that is reasonably necessary to be exercised by the inspector for the purposes of this Act.
- (2) A person required to give reasonable help under subsection (1)(f) must not, without reasonable excuse, refuse or fail to comply with the requirement.  
Maximum penalty:  
In the case of an individual—\$10 000.  
In the case of a body corporate—\$50 000.
- (3) Subsection (2) places an evidential burden on the accused to show a reasonable excuse.

## **Specific powers on entry**

### **171 Power to require production of documents and answers to questions**

- (1) An inspector who enters a workplace under this Division may:
  - (a) require a person to tell the inspector who has custody of, or access to, a document; or
  - (b) require a person who has custody of, or access to, a document to produce that document to the inspector while the inspector is at that workplace or within a specified period; or
  - (c) require a person at the workplace to answer any questions put by the inspector.

(2) A requirement under subsection (1)(b) must be made by written notice unless the circumstances require the inspector to have immediate access to the document.

(3) An interview conducted by an inspector under subsection (1)(c) must be conducted in private if:

- (a) the inspector considers it appropriate; or
- (b) the person being interviewed so requests.

(4) Subsection (3) does not limit the operation of section 166 or prevent a representative of the person being interviewed from being present at the interview.

(5) Subsection (3) may be invoked during an interview by:

- (a) the inspector; or
- (b) the person being interviewed, in which case the subsection applies to the remainder of the interview.

(6) A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section.

Maximum penalty:

In the case of an individual—\$10 000.

In the case of a body corporate—\$50 000.

Note See sections 172 and 173 in relation to self-incrimination and section 269 in relation to legal professional privilege.

(7) Subsection (6) places an evidential burden on the accused to show a reasonable excuse.

### **172 Abrogation of privilege against self-incrimination**

(1) A person is not excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.

(2) However, the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

### **173 Warning to be given**

(1) Before requiring a person to answer a question or provide information or a document under this Part, an inspector must:

- (a) identify himself or herself to the person as an inspector by producing the inspector's identity card or in some other way; and
- (b) warn the person that failure to comply with the requirement or to answer the question, without reasonable excuse, would constitute an offence; and
- (c) warn the person about the effect of section 172; and
- (d) advise the person about the effect of section 269.

(2) It is not an offence for an individual to refuse to answer a question put by an inspector or provide information or a document to an inspector under this Part on the ground that the question, information or document might tend to incriminate him or her, unless he or she was first given the warning in subsection (1)(c).

(3) Nothing in this section prevents an inspector from obtaining and using evidence given to the inspector voluntarily by any person.

### **174 Powers to copy and retain documents**

(1) An inspector may:

- (a) make copies of, or take extracts from, a document given to the inspector in accordance with a requirement under this Act; and
- (b) keep that document for the period that the inspector considers necessary.

(2) While an inspector retains custody of a document, the inspector must permit the following persons to inspect or make copies of the document at all reasonable times:

- (a) the person who produced the document;
- (b) the owner of the document;
- (c) a person authorised by a person referred to in paragraph (a) or (b).

### **175 Power to seize evidence etc.**

(1) An inspector who enters a workplace under section 163 may seize anything (including a document) at the place if the inspector reasonably believes the thing is evidence of an offence against this Act.

(2) An inspector who enters a place with a search warrant may seize the evidence for which the warrant was issued.

(3) An inspector may also seize anything else at the place if the inspector reasonably believes:

- (a) the thing is evidence of an offence against this Act; and
- (b) the seizure is necessary to prevent the thing being hidden, lost or destroyed or used to continue or repeat the offence.

## **Adverse publicity orders**

### **236 Adverse publicity orders**

(1) The court may make an order (an adverse publicity order) in relation to the offender requiring the offender:

- (a) to take either or both of the following actions within the period specified in the order:
  - (i) to publicise, in the way specified in the order, the offence, its consequences, the penalty imposed and any other related matter;
  - (ii) to notify a specified person or specified class of persons, in the way specified in the order, of the offence, its consequences, the penalty imposed and any other related matter; and
- (b) to give the regulator, within 7 days after the end of the period specified in the order, evidence that the action or actions were taken by the offender in accordance with the order.

- (2) The court may make an adverse publicity order on its own initiative or on the application of the person prosecuting the offence.
- (3) If the offender fails to give evidence to the regulator in accordance with subsection (1)(b), the regulator, or a person authorised in writing by the regulator, may take the action or actions specified in the order.
- (4) However, if:
- (a) the offender gives evidence to the regulator in accordance with subsection (1)(b); and
  - (b) despite that evidence, the regulator is not satisfied that the offender has taken the action or actions specified in the order in accordance with the order,
- the regulator may apply to the [designated court] for an order authorising the regulator, or a person authorised in writing by the regulator, to take the action or actions.
- (5) If the regulator or a person authorised in writing by the regulator takes an action or actions in accordance with subsection (3) or an order under subsection (4), the regulator is entitled to recover from the offender, by action in a court of competent jurisdiction, an amount in relation to the reasonable expenses of taking the action or actions as a debt due to the regulator.

(note: this provision applies only if a court convicts a person or finds a person guilty of an offence)

# Appendix D: Education and Care Services National Law 2012 (Extract)

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## Disclosure of information

### 271 Disclosure of information to other authorities

- (1) The Regulatory Authority and any government department, public authority and local authority may disclose information in respect of education and care services to each other for the purposes of this Law.
- (2) The Regulatory Authority may disclose information in respect of education and care services to the National Authority or a Regulatory Authority of a participating jurisdiction or a person acting for that Authority—
  - (a) for the purposes of this Law; or
  - (b) for the purposes of research and the development of national policy with respect to education and care services.
- (3) The Regulatory Authority may disclose information in respect of education and care services to the relevant Commonwealth Department or a person acting for the relevant Commonwealth Department—
  - (a) for the purposes of this Law; or
  - (b) for the purposes of research and the development of national policy with respect to education and care services; or
  - (c) for a purpose relating to the funding of education and care services; or
  - (d) for a purpose relating to the payment of benefits or allowances to persons using education and care services.
- (4) The Regulatory Authority must disclose to the Regulatory Authorities of other participating jurisdictions the suspension or cancellation of a working with children check, working with children card or teacher registration of a nominated supervisor or certified supervisor of which it is notified under this Law.
- (5) The Regulatory Authority may disclose to the head of the government department responsible for the administration of a working with children law, any prohibition notice issued under this Law.