



REVIEW OF HVNL INVESTIGATIVE AND ENFORCEMENT POWERS AUSTRALIAN TRUCKING ASSOCIATION RESPONSE DECEMBER 2016

Introduction

In August 2015, the ATA recommended that the NTC should propose a cautious increase in the investigative powers in the HVNL, given the limitations of those powers compared to the model WHS Act and the other proposed chain of responsibility reforms.¹

Following the ATA's recommendation and similar calls from state agencies, transport ministers agreed to add a new section, section 270A, to the law.

Ministers later tasked the NTC with reviewing all of the investigative and enforcement powers in chapters 9 and 10 of the law and their application by enforcement agencies. The NTC released a discussion paper setting out 13 proposals in October 2016.

The comments and recommendations in this response are structured in the same order as the issues raised in the discussion paper. This response does not deal with every proposal put forward in the paper, but focuses instead on the ones of principal importance to the trucking industry.

Simplifying the HVNL information-gathering powers (chapter 5.3)

Chapter 5.3 of the discussion paper considers if the introduction of the new information gathering power in the HVNL, s 570A, could add unnecessary complexity and result in situations where information gathered in relation to an offence using one power could be inadmissible in relation to another associated offence.²

In the ATA's view, the inconsistent investigative powers in the law will inevitably lead to confusion and challenges to the admissibility of evidence. In particular:

- a request for information under s 570A can only be issued in relation to a possible contravention of the new primary safety duty or to monitor or enforce compliance with that duty.
- requests under sections 569 and 570 do not have to be in writing, potentially leading to confusion about whether a request for information is mandatory or not. In contrast, all requests for information under s 570A must be in writing.

¹ ATA, *Primary duties for chain of responsibility parties and executive officer liability*. Submission to the NTC, August 2015. [Link](#).

² NTC, *Review of HVNL investigative and enforcement powers*. Discussion paper, October 2016, 19.

- An individual required to produce documents under sections 569 and 570 cannot claim evidential immunity with respect to those documents.³ In contrast, individuals can claim evidential immunity with respect to documents provided under s 570A.⁴
- none of the information-gathering powers are subject to a codified requirement that a warning be given, even though warnings are required by both the state evidence acts⁵ and the common law.⁶ In the ATA's experience, it is not uncommon for authorised officers to fail to give duty holders a warning as required.

The discussion paper proposes that any practical issues raised by the inconsistencies between sections 569, 570 and 570A should be addressed through the development of operational guidance and training.

The ATA does not agree with this position. The problems created by the inconsistencies between the sections are only likely to come to light when an injustice is done to a duty holder or a prosecution fails because of admissibility issues. Neither outcome is acceptable to the ATA, given our view that an appropriate balance must be struck between the interests of duty holders and the authorities.

In considering alternatives to the current provisions of the HVNL, the ATA initially leaned toward option 1 in the discussion paper – removing sections 569 and 570 from the HVNL entirely, and extending the application of new section 570A across the whole Act.⁷

On reflection, however, we do not consider this approach to be viable. The HVNL requires operators to keep a range of compliance documents, such as duplicate work diary pages⁸ and payment records.⁹ These documents may form the fundamental basis for a case against an allegedly non-compliant operator; information about documents issued under the law or required to be kept is not subject to evidential immunity.¹⁰ It would, in the ATA's view, be inappropriate for these basic compliance documents to be subject to the immunity available under s 570A.

Option 1 would also create a new inconsistency where a work diary page (for example) would be admissible if obtained from a driver under s 568¹¹ but would be inadmissible against an individual if obtained from the operator.

Accordingly, the ATA recommends that further consideration be given to a **modification of option 2** in the discussion paper. Option 2 proposes the retention of sections 569 and 570 and the extension of s 570A across the whole Act.¹²

³ s 588(3).

⁴ s 570A(7)

⁵ See s 90 of the *Evidence Act 1995* (NSW).

⁶ *Workcover Authority (NSW) v Seccombe* (1998) 43 NSWLR 390.

⁷ NTC, 20.

⁸ s 321(1)(b)

⁹ s 319(1)(b) for 100 km work and s 321(1)(c) for 100 km+ work.

¹⁰ See s 588(1) and ss 569(1)(a) and (b).

¹¹ s 568 empowers authorised officers to require the production of documents that a driver is 'required under the Law to keep in the driver's possession while driving the vehicle.'

¹² NTC, 22.

Under our modified version of option 2, the ATA proposes that the investigative powers in sections 569, 570 and 570A be amended as follows:

- sections 569 and 570 should be amalgamated and simplified to apply only to documents issued or required to be kept under the Law, transport or journey documentation (including for past journeys), and vehicle and load details. Individuals would not be able to claim immunity in relation to these documents.
- requests for information under the amalgamated section would be in writing. The simple act of writing a notice would add rigour and discipline to the request, and would help authorised officers to be clear about what they want. It would also provide a clear and legitimate basis for there to be a process of clarification of the precise information requested.
- authorised officers would have to hold a reasonable belief that the person they were interviewing was capable of giving written or oral information in relation to a possible contravention of the Act, or that the information would assist in monitoring or enforcing compliance.
- consistent with s 570A(4)(b), the use of the power should be subject to a reasonable time and place qualifier.
- section 570A should be redrafted to apply across the whole Act.
- all the information gathering powers in the Law, including s 568, should be subject to a warning provision similar to s 173 of the model WHS Act. This section has proved to be effective because it clarifies the common law warning that authorised officers must provide persons before asking for information.

The incorporation of a comparable provision in the HVNL would enable enforcement agencies to provide easy to follow instructions and training to their authorised officers. It would effectively elevate any operational procedures that are in place to the status of a codified legal requirement.

Recommendation 1

NTC proposal 1 should not be adopted. Instead, the information gathering powers in the HVNL should be simplified by applying s 570A across the law and amalgamating and simplifying sections 569 and 570 to focus on a narrow range of documents and information. All requests for information under these sections should be required to be in writing.

Recommendation 2

All of the investigative powers in the HVNL, including s 568, should be subject to a codified warning provision comparable to s 173 of the model WHS Act.

Clarifying the form in which information required may be produced (chapter 5.4)

Section 569 of the HVNL empowers authorised officers to require the production of documents from a responsible person for a heavy vehicle. Under s 569(3), electronic documents must be provided as a 'clear written reproduction.'

In chapter 5.4 of the discussion paper, the NTC proposes that s 569 should be amended to clarify that electronic documents can be required to be produced in electronic form.¹³

The ATA supports this proposal. It is helpful for a person required to produce electronic information to be able to produce the information in the form used in their operations, however it is important that the requirement is qualified by what is **reasonable**.

Frequently, software used in operations is not able to be provided electronically because it is embedded in complex machinery and cannot be exported easily. Even when electronic information can be exported, enforcement agencies frequently underestimate the large amount of information that may need to be provided to comply with an overbroad request.

As a result, there is often a need for cooperative discussions between enforcement agencies, persons producing information and their legal representatives about the most practical way to provide it (which could, for example, include screen shots of particular software in operation).

The principle of reasonableness already exists in good regulatory practice. It would be sensible for it to be reflected in the HVNL also.

Recommendation 3

NTC proposal 2 should be adopted, with the addition of a reasonableness qualifier.

Requiring a responsible person to identify a third party where that person holds relevant records (chapter 5.6)

Sections 569 and 570 of the HVNL enable authorised officers to require information or documents from 'responsible persons.' There is no obligation on those persons to inform an officer about information held by a third party, although they can be required to provide information about other responsible persons for a vehicle.¹⁴

The discussion paper looks at amending these sections to require responsible persons to identify third parties who hold documents or information relevant to the investigation of an offence.¹⁵

The ATA joins the NTC in rejecting this suggestion.

¹³ NTC, 23

¹⁴ s 570(1)(b).

¹⁵ NTC, 25.

Sections 569, 570 and 570A provide authorised officers with ample powers to require the production of documents and information, including information that would point to the identity of relevant third parties such as telematics providers.

As a matter of principle, securing that information is part of the job of an enforcement agency. Persons under investigation should not have to provide a complimentary concierge service.

Additionally, in practice, an obligation to identify third parties would be extremely challenging for a responsible person to understand and apply. They are not lawyers or investigators themselves; they cannot be expected to know what evidence could be relevant to investigating an offence. The proposal would be likely to lead to frequent unintentional breaches by responsible persons (which cannot be the intention of policy makers), or significant additional legal costs.

Recommendation 4

NTC proposal 4 should be adopted. The HVNL should not be amended to require responsible persons to identify third parties who hold documents or information relevant to the investigation of an offence.

Simplifying the HVNL powers of entry, search and seizure (chapter 6.3)

Chapter 6.3 of the discussion paper reviews the HVNL powers of entry, search and seizure, and proposes that changes should be made on a provision by provision basis as stakeholders provide evidence of issues. It proposes that operational guidance and training should be provided to address the complexity of the powers.¹⁶

The ATA does not agree with the discussion paper proposal, and instead recommends that the powers should be amended to bring them into line with the model WHS Act.

In the ATA's view, the model WHS Act powers would cover all of the situations that the current HVNL powers address. The simplicity and familiarity of the powers would advantage to both authorised officers and responsible persons.

Recommendation 5

NTC proposal 5 should not be adopted. The HVNL entry, inspection, search and seizure powers should be simplified using the model WHS Act as a model.

Amending the HVNL to include additional sanctions (chapter 7.3)

Chapter 7.3 of the discussion paper considers the possible addition of a range of sanctions to the HVNL, namely:

¹⁶ NTC, 31.

- prohibition notices
- formal cautions
- enabling courts to issue injunctions in line with sections 215 and 240 of the model WHS Act and
- adverse publicity orders.

The ATA agrees with the NTC that the HVNL should not be amended to include prohibition notices, formal cautions or adverse publicity orders.

In particular, we are concerned about the potential for confusion between formal cautions (if added to the law) and formal warnings issued under existing s 590. We further consider that the addition of adverse publicity orders to the range of sanctions available is unnecessary given NTC proposal 9 and the well-established ability of road agencies to publicise their enforcement operations.

The ATA supports the NTC proposal to amend the HVNL to enable the courts to issue injunctions:

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

This additional power would most likely be used in extreme situations involving a brazen and serious breach of a notice or HVNL obligation. It would not affect operators in their day to day operations.

Recommendation 6

NTC proposal 8 should be adopted. The HVNL should be amended to enable the courts to issue injunctions compelling a person to comply with a notice and/or requiring a person to cease contravention of the HVNL.

Publication of enforcement action outcomes (chapter 7.4)

Chapter 7.4 of the discussion paper considers if the NHVR should be required to publish court outcomes, including the details of the penalties imposed and orders and undertakings made.¹⁷

The paper supports this option, as does the ATA.

It is in the interests of the industry for there to be accurate information available about court outcomes, enforceable undertakings and especially the persons subject to prohibition orders under Division 6 of Part 10.3 of the law.

¹⁷ NTC, 41.

The ATA considers that the requirement to publish enforcement outcomes should be included in the HVNL and supported by administrative processes to ensure that:

- the published information about court outcomes includes the results of appeals
- the list of persons subject to prohibition orders is canonical.

Recommendation 7

NTC proposal 9 should be adopted, with the requirement implemented through an amendment to the HVNL and administrative guidelines to ensure that:

- the published information about court outcomes includes the results of appeals
- the list of persons subject to prohibition orders under Division 6 of Part 10.3 is canonical.

Clarifying information sharing arrangements between jurisdictions and enforcement agencies (chapter 9.4)

From the ATA's perspective, a key part of the case for establishing the NHVR was to enable chain of responsibility investigations to be carried out seamlessly across state borders.

In a 2009 submission, the ATA said:

If a business operating in several capital cities should be able to procure the same freight transport services across the country in the same way, and not have to worry about differences in regulations, then it also follows that this business should be consistently accountable under the Chain of Responsibility for its actions across the country.

(...)

The national regulator will also need to ensure that information and intelligence on the activities of customers is being reliably gathered across the country, so that businesses that continue to require, encourage and profit from illegal on-road behaviours are reliably identified and action is initiated, regardless of where they are based.¹⁸

Chapter 9.4 of the discussion paper reports that investigations still tend to be confined to one jurisdiction only.¹⁹ The discussion paper recommends that the NHVR should develop memorandums of understanding or other protocols to facilitate the sharing of information.²⁰

¹⁸ ATA, *National framework for regulation, registration and licensing of heavy vehicles: consultation regulatory impact statement: supplementary submission*. Submission to the Australian Government Department of Infrastructure, Transport, Regional Development and Local Government, May 2009. [Link](#)

¹⁹ NTC, 50.

²⁰ NTC, 52.

The ATA strongly supports the development of better protocols between the NHVR and other government agencies.

In the industry's experience, a truck accident can lead to investigations by a number of agencies with overlapping responsibilities, including police, the state work health and safety regulator, the state transport department, the state environmental protection agency and possibly Comcare if a multi-state employer is involved.

The development of MoUs and lead agency arrangements could reduce unnecessary duplication and costs for both industry and enforcement agencies.

Given the importance of seamless CoR investigations to the industry, however, we do not believe that developing better protocols would go far enough to overcome the limitations of the HVNL.

The ATA considers that the NTC should further develop options 1 and 2, as well as supporting the development of better protocols.

Recommendation 8

The NTC should further develop options 1 and 2 in chapter 9.4 of the discussion paper, as well as supporting the development of better administrative protocols, given the importance of seamless chain of responsibility investigations.

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