Attn: HVNL Fatigue Issues
National Transport Commission
Level 3/600 Bourke Street
Melbourne VIC 3000

3 July 2018

Dear Sir/Madam

SARTA makes the following submission on the issue of s245 of the HVNL in response to the NTC’s Issues paper released for comment.

The NTC’s paper says:

“The NTC discussed the interpretation of section 245 of the HVNL with the NHVR. The NHVR’s position is that all work done by drivers has the capacity to affect their fatigue when they return to a participating jurisdiction. The NHVR further advised that their interpretation of section 245 of the HVNL is that it applies to drivers who work outside of a participating jurisdiction and return into a participating jurisdiction. The NHVR confirmed the policy intent of section 245 to include: work activities outside of participating jurisdictions are counted when the driver works in a participating jurisdiction, and there are appropriate protections in the provision to avoid it becoming overly burdensome. The NHVR advised that section 245 of the HVNL delivers the intended policy outcome and is a legislative necessity given that there are still two non-participating jurisdictions in Australia. The NHVR is of the view that there is no reason why drivers could not comply with the regulatory requirements of participating and non-participating jurisdictions by adopting the more restrictive limits. The NHVR noted that industry was consulted on the policy intent prior to the provision being created in 2004 and 2006 and anecdotally, industry is aware of and compliant with the provision.”

We are appalled at some of these dismissive, ill-informed and arrogant comments made by the NHVR about s245 in the NTC paper and we have responded to them as follows.

1. “The NHVR’s position is that all work done by drivers has the capacity to affect their fatigue when they return to a participating jurisdiction.”
   a. This is a simplistic and rather fatuous statement by the NHVR, as there is no suggestion from any quarter that any work time should be ignored in any way. It is a question of which Work-Rest Counting Rules should apply within non-participating jurisdictions.
b. The NHVR’s comment is also spurious in so far as it ignores the reality that WA-based drivers, who operate under the WA Fatigue Management regime, enter a participating jurisdiction on the same roads as returning drivers from participating jurisdictions and the NHVR seeks to treat them differently, through s245 without any evidence or justification.

2. “The NHVR further advised that their interpretation of section 245 of the HVNL is that it applies to drivers who work outside of a participating jurisdiction and return into a participating jurisdiction.”
   a. This statement is self-evidently true and adds nothing to the debate.
   b. The bigger question, left unaddressed by the NHVR comments but none the less raised by s245 is precisely to whom does s245 apply:
      i. If it is simply to all and any drivers who enter a non-participating jurisdiction and return to a participating jurisdiction within 7 days, then this would presumably apply to all drivers who work a weekly run between Perth and Adelaide for example, or on Sydney and Perth returns on a 10 day cycle or whatever;
      ii. s245 says nothing about the point of origin of trips;
      iii. every Perth-based driver who runs to Adelaide and returns would in fact fall into the criteria of entering a non-participating jurisdiction (WA) on their return leg and then leaving it again within 7 days on the outbound leg of their next trip.
      iv. If that is seen as falling under s245 then every single regular interstate between Perth and places in participating jurisdictions would be covered by s245 and prohibited from utilising WA Fatigue Management rules including citizens of WA who are based in WA.

3. “The NHVR confirmed the policy intent of section 245 to include: work activities outside of participating jurisdictions are counted when the driver works in a participating jurisdiction, and there are appropriate protections in the provision to avoid it becoming overly burdensome.”
   a. The NHVR’s contention in the second half of this statement, that “there are appropriate protections in the provision to avoid it becoming overly burdensome” is vague and unsubstantiated:
      i. What are the “protections” to which the NHVR refers?
      ii. s245, as noted by the NHVR above, purports to apply the HVNL to all Work and Rest time spent within a non-participating jurisdiction by a driver who has entered that jurisdiction and returned to a participating jurisdiction within 7 Days. That is the point and there is no “protection” against that.
      iii. The assertion by the NHVR in this statement that the non-existent “protections” serve to “avoid it becoming overly burdensome” is patently absurd and ill-informed if informed at all.
         1. The simple reality is that if under s245 a driver who is operating under BFM or Standard Hrs has to continue to work within those rule sets after entering WA for example, rather than utilising the WA Fatigue Management regime, they would be unable to reach Perth from the SA/WA border in one shift as that requires a 15.5 hr work shift that is only available under the AFM regime or the WA Fatigue Management regime.
         2. So the application of s245 would mean that those BFM/Standards Hrs drivers from participating jurisdictions would have to stop for an additional continuous break of at least 7 and probably 9 hrs at Northam before being able to continue on for the extra 1.5 hrs to Perth. They would also be forced to take a second additional sleep rest en-route on the return leg of the journey.
3. These drivers would be unlikely and unable to take further sleep rest in the 7 to 10 or more hours that they are in Perth awaiting the unloading/reloading of their rigs and they would then start the return journey from Perth to the eastern states.

4. This contrasts dramatically and adversely with the far safer regime for drivers working under AFM or the WA Fatigue Management who are able, safely and legally, to travel from the SA/WA border to Perth in a single shift of 15.5 hrs and then have a far better continuous rest of 7 to 10 or more hours in Perth whilst their rig is unloaded and reloaded for the return journey.

5. The NHVR’s false assumption that s245 avoids being “overly burdensome” shows complete ignorance of the operational realities of the highly consistent weekly return run from say Adelaide to Perth and back and of the massive fatigue management restorative benefits of that regularity enabling the operators to guarantee their drivers a 40 to 48 hr continuous rest between journeys.

6. This restorative long rest would not be possible under the regime espoused by the NHVR under s245 and all BFM/Standard Hrs drivers would end up far more fatigued than those drivers operating whilst within WA under the WA Fatigue Management regime or AFM.

7. So the NHVR’s ill-informed and unjustified view would be utterly counter-productive from a safety and fatigue management perspective.

4. “The NHVR advised that section 245 of the HVNL delivers the intended policy outcome and is a legislative necessity given that there are still two non-participating jurisdictions in Australia.”
   a. The statement that s245 “is a legislative necessity” is spurious as it is seemingly based upon a flawed assumption that it is necessary that the HVNL fatigue management regime must be applied nationally at least to any driver who enters a non-participating jurisdiction and returns to a participating jurisdiction again within 7 days and that there is some benefit or safety outcome derived from doing so.
   b. There is neither logic nor safety-outcome evidence to support that contention.
   c. Why is it that none of the other numerous safety-focussed provisions of the HVNL are also purported to apply to drivers/rigs that enter a non-participating jurisdiction and return again within 7 days?
   d. The effect of this claim by the NHVR is to argue that its necessary to impose s245 so as to impose s245 in jurisdictions that have exercised their right not to participate in the HVNL.

5. “The NHVR is of the view that there is no reason why drivers could not comply with the regulatory requirements of participating and non-participating jurisdictions by adopting the more restrictive limits.”
   a. This statement serves to prove that the NHVR has absolutely no idea of the operational realities involved, as we have outlined above, nor of the significant and adverse fatigue management and hence safety consequences of applying s245 which is far more problematic than apparently seems from behind the NHVR’s desks in Brisbane.
   b. It is not a simplistic and short-sighted matter of whether or not a driver could comply with s245 but rather of what the safety and operational consequences would be if they do comply.
   c. The NHVR has made no real effort to understand those operational realities or this issue and its consequences if s245 is applied.
6. “The NHVR noted that industry was consulted on the policy intent prior to the provision being created in 2004 and 2006 and anecdotally, industry is aware of and compliant with the provision.”

   a. This is a disingenuous statement by the NHVR. Yes the industry was consulted on the entire HVNL Bill and the industry identified over 900 issues.
   b. Those issues we debated at length in countless meetings with the NTC and jurisdictions.
   c. S245 was utterly over-looked by industry, as evidenced by the fact that when SARTA brought it to the industry’s attention having had it raised by the NHVR when considering a SARTA member’s AFM application, the entire industry and all peak bodies were caught by complete surprise.
   d. The NHVR itself approved numerous BFM and AFM programs that I developed with operators that all contained the section about ensuring that drivers re-aligned with the HVNL before re-entering a participating jurisdiction (by taking a 7 hr sleep rest on the other (WA or NT) side of the border.
   e. The NHVR had not objected to that section in any of those AFM/ BF M programs until suddenly the NHVR started to do so in 2017. This shows that either the NHVR was not performing its job properly up until then or that they had a revelation when they discovered s245 themselves.
   f. None of the countless operators nor any of the other industry peak bodies, were aware of s245 and its purported effect until SARTA raised it in 2017. The NTC itself was unaware of the issue and had to have it explained by SARTA several times.
   g. So we refute utterly the baseless assertion by the NHVR that “anecdotally industry is aware of” the provision.
   h. It is equally false for the NHVR to assert that the industry is “compliant with the provision”.

So in summary s245:

   1. Is dangerously counter-productive as its effect would be to force the many hundreds of drivers who operate regular BFM/ Standard Hours runs between Perth/Darwin and participating jurisdictions, to suffer adverse fatigue management and safety outcomes;
   2. There is no directionality built into s245 and so all drivers performing regular runs that result in them leaving a participating jurisdiction within 7 days of having entered it are covered by s245 according to the NHVR view, regardless of whether they started in Perth or outside of WA for example.
   3. It is illogical and nonsensical to force two different Work-Rest fatigue management regimes on drivers within a non-participating jurisdiction simply on the basis of the amount of time they spend in those non-participating jurisdictions either by virtue of:
      a. Applying s245 only when the journey commenced outside of the non-participating jurisdiction, thus excluding WA based drivers who having left WA, go back into WA and then come back out again on their next trip within 7 days; or
      b. Applying s245 only within 7-day timeframes, presumably leaving, under the NHVR view, fatigued and unsafe drivers from say WA to travel freely less frequently into a participating jurisdiction on the same roads and in amongst the traffic with drivers caught by s245.
      c. Drivers on the roads in participating jurisdictions are either safe and compliant or they are not. It would be an absurd outcome to allow drivers who are deemed unsafe because they have worked within WA under the WA Fatigue management
4. **All BFM/Standard Hours drivers and their employing operators and their schedulers**, are, perhaps with rare exception in breach of s245 today because the industry norm is to operate within the WA or NT Fatigue Management regimes whilst within those jurisdictions for sound operational reasons and with no adverse safety outcomes that arise from that fact.

5. **It is impractical to expect them to do otherwise and the cost and hence Cost-benefit Analysis** would not by any measure justify s245 being applied.

6. s245 is a quirk of the evolution of the HVNL and its precursor within the Model Law and within the previous SA law were never enforced as they were recognised as being incapable of enforcement without the intended companion enabling provision within the WA law which was never enacted.

7. There is no evidence to support the argument that s245 is either effective or necessary. Indeed that fact that the all but universal utilisation of the WA fatigue Management regime within WA and NT within NT) by all drivers and operators/schedulers delivers safe and compliant outcomes (the fatigue-related incidents that have occurred are not and can’t be attributed to use of the WA fatigue rules within WA).

8. The broader industry is NOT aware of s245, as we know from the responses on the SARTA Facebook page when we publicised the issue as well as from members in response to our members weekly bulletins.

9. The boarder industry do NOT comply with s245 and could not do so without significant and counter-productive adverse fatigue management and safety outcomes.

10. The only legal way for them to comply would be for them all to operate under AFM and access hours equivalent to the WA Fatigue Management regime under the HVNL and that would raise the obvious question of **why impose that cost and burden on the industry for the same hours outcomes as are currently used under the WA Fatigue Management regime?**

11. s245 should be repealed as:
    a. it is not enforced;
    b. it is not complied with;
    c. it is not seen by police as enforceable;
    d. it is ineffective;
    e. it is redundant.

Yours faithfully

S. B. Shearer
Executive Officer