EXPOSURE DRAFT HEAVY VEHICLE NATIONAL LAW AMENDMENT BILL AND HEAVY VEHICLE NATIONAL AMENDMENT REGULATIONS

AUSTRALIAN TRUCKING ASSOCIATION SUBMISSION
21 NOVEMBER 2024

1. About the Australian Trucking Association

The Australian Trucking Association is a united voice for our members on trucking issues of national importance. Through our eleven member associations, we represent the 60,000 businesses and 200,000 people who make up the Australian trucking industry.

2. Introduction

On 10 October 2024, the National Transport Commission (NTC) published exposure drafts of the Heavy Vehicle National Law Amendment Bill[1] and the Heavy Vehicle National Amendment Regulations.[2]

These drafts substantially implement the decisions that were documented in the Heavy Vehicle National Law high-level regulatory framework decision RIS[3] and the Reforms to Heavy Vehicle National Law decision RIS.[4]

The drafts do not include the proposed increase in general mass limits to match CML, the increase in general access length from 19 to 20 metres or the increase in truck height from 4.3 to 4.6 metres. These remain subject to further analysis and drafting, and are to be finalised in early 2025.[5]

In conjunction with its release of the drafts, the NTC published the results of its review of 349 HVNL penalties.[6]

Section 3 of this submission sets out the ATA's recommendations on changes to the exposure draft package, noting that the purpose of exposure drafts is to test the legislative implementation of policy decisions that have already been made.

Section 4 considers the findings of the penalties review and makes two additional recommendations.

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[1] Heavy Vehicle National Law Amendment Bill 2024. Parliamentary Counsels' Committee exposure draft, October 2024.
[2] Heavy Vehicle National Amendment Regulations 2024. Parliamentary Counsels' Committee exposure draft, October 2024.
[3] NTC, Heavy Vehicle National Law high-level regulatory framework, May 2023.
[4] NTC, Reforms to Heavy Vehicle National Law decision regulation impact statement, July 2024.
[5] NTC, Consultation summary: draft Heavy Vehicle National Law Amendment Bill and Heavy Vehicle National Amendment Regulations. October 2024, 5.
[6] NTC, HVNL penalties review: summary of proposed penalty changes. October 2024.

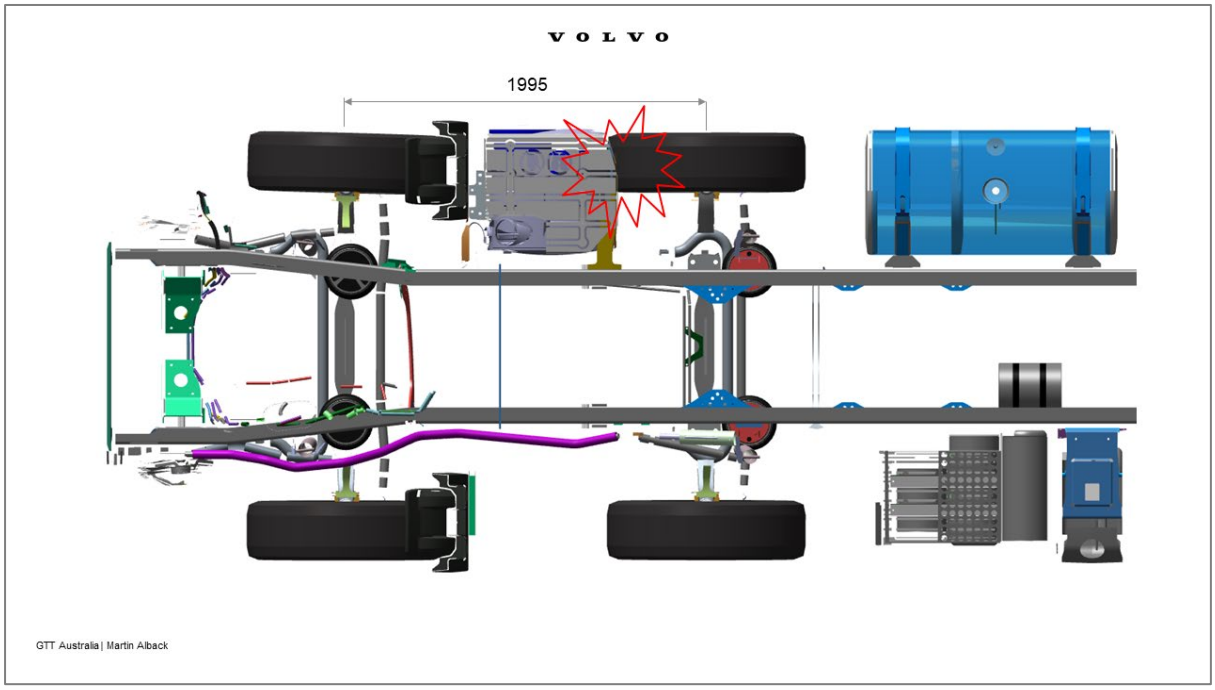
3. ATA comments on the exposure drafts

Change to the definition of twinsteer axle group
HVNL Amendment Bill item 2
HV National Amendment Regulations, schedule 2, item 2

The HVNL definition of a twinsteer axle group requires the two axles to be at least one metre but not more than two metres apart.[7]

The ATA and the Truck Industry Council have campaigned to increase the maximum spacing from two metres to 2.5 metres, to accommodate the larger mufflers required for Euro VI trucks. Figure 1, supplied by Volvo Group Australia, illustrates the problem.

Figure 1: Volvo twinsteer with current axle spacing and Euro VI muffler



The exposure draft package would—

- move the technical specifics of the definition to the national regulations, so it could be changed with less difficulty in the future[8]
- set the maximum spacing to 2.5 metres.[9]

[7] HVNL, s 5 (definition of 'twinsteer axle group').
[8] Exposure draft bill, item 2 (definition of 'twinsteer axle group').
[9] Exposure draft regulations, schedule 2, item 2, new section 5C.

These legislative amendments are only part of the work being undertaken to increase the spacing between twinsteer axles.

- the Australian Government has amended the Australian Design Rules to allow vehicles with 2.5 metre twinsteer axles to be provided to the market[10]
- the NHVR is developing a notice, and if necessary supporting permits, as an interim solution until the HVNL amendments come into force.[11]

The ATA supports these amendments. They are not just important in their own right: they highlight the importance of moving technical detail out of the primary HVNL and into the regulations. The ATA has advocated for this approach throughout the review.[12]

Driving while unfit to drive
HVNL Amendment Bill items 51-60

Items 51-60 of the bill would extend the existing duty on drivers not to drive while fatigued to include driving while unfit to drive. Proposed s 225(2) would define 'unfit to drive' as follows—

> (2) A driver of a heavy vehicle is unfit to drive the heavy vehicle on a road if the driver is not of sufficiently good health or fitness to drive the heavy vehicle safely.

Proposed s 228(1) would set out the maximum penalty for driving while unfit to drive—

> (1) A person must not drive a heavy vehicle on a road while the person is impaired by fatigue or unfit to drive.
>
> Maximum penalty—$20000

Items 19, 20 and 22 of the bill would amend s 26E to prohibit requests or contracts that a person knows, or reasonably ought to know, would cause or encourage a driver to drive while unfit to drive.

The May 2023 Decision RIS noted that the intent of these changes was to place obligations on drivers to take a proactive and preventative approach to managing their health and fitness because they have a shared responsibility to ensure they are fit to drive.[13]

[10] *Vehicle Standard (Australian Design Rule) Twin Steer Amendments 2024.*
[11] de Rozario, A. *Safer, more productive trucks*. Presentation to TMC 24, 22 October 2024.
[12] ATA, A risk-based approach to regulating heavy vehicles: HVNL review issues paper 1. Submission to the NTC, May 2019. 10-11.
[13] NTC, May 2023, 178.

The ATA supports the intent of the amendments, which would discourage individuals from—

- deliberately failing to schedule referred medical tests that they know would result in them failing to meet the applicable standards in *Assessing Fitness to Drive*
- failing to take prescribed medication, or
- working despite being warned not to operate machinery (for example, after a medical procedure involving sedation).

We are, however, concerned about the drafting of the two sections.

The definition of 'unfit to drive' in proposed s 225(2) is highly subjective and indeterminate. The offence provision has the appearance of being an offence of absolute liability. It does not appear to be predicated on the driver having any actual knowledge or reason to know or suspect they are unfit.

To address these issues, the ATA considers that proposed s 225(2) should be rewritten in objective and determinate terms and proposed s 228(1) should be amended to add a knowledge element, so a person must not drive a heavy vehicle on a road if they know, or reasonably ought to know, that they are unfit to drive.

Recommendation 1

Proposed s 225(2) should be amended to read—

> (2) A driver of a heavy vehicle is unfit to drive the heavy vehicle on a road if—
>
> (a) the driver does not meet the standards in *Assessing Fitness to Drive* that apply to the driver;
>
> (b) the driver is driving in breach of any medical condition or restriction on the driver's licence or any conditional fitness to drive report issued by an Australian registered medical practitioner; or
>
> (c) the driver is driving contrary to any instruction issued by an Australian registered medical practitioner that the driver should not drive the vehicle.

Proposed s 228(1) should be amended to read—

> (1) A person must not drive a heavy vehicle on a road while the person is impaired by fatigue or if the person knows, or reasonably ought to know, that the person is unfit to drive.
>
> Maximum penalty—$20000

Extraterritorial application of work and rest hours
HVNL Amendment Bill, new item 62A

Section 245 of the law purports to apply the HVNL time counting rules in the two non-participating jurisdictions, Western Australia and the Northern Territory. Under the section—

- a driver who leaves the HVNL area and then returns within seven days must comply with the HVNL time counting rules at all times while they are in the non-participating jurisdiction[14]
- a driver who only worked in a non-participating jurisdiction during the previous seven days must comply with the HVNL time counting rules from the start of their last major rest break. [15]

Because of its complexity, s 245, if applied to a driver's time in a non-participating jurisdiction, causes confusion for businesses and drivers. It discourages businesses from operating across the WA and NT borders.

The section also raises questions about whether there is a sufficient geographical nexus to enable an HVNL state to charge a driver over their work and rest times in a non-participating jurisdiction.

The NTC has argued that work performed outside a participating jurisdiction can contribute towards fatigue inside a participating jurisdiction and is therefore relevant to whether an offence under the HVNL has been committed.[16]

That argument does not stand up if s 245 operates differently, as it does, for drivers who enter a non-participating jurisdiction and return to a participating jurisdiction within seven days, as compared to a driver who only worked within a non-participating jurisdiction for the entire seven days before entering a participating jurisdiction.

Of course, a driver who works while impaired by fatigue as a result of working outside the HVNL area – or for any other reason – would commit an offence under s 228.

It is difficult to see, however, how the details of a driver's work and rest breaks outside the HVNL area before their last major rest break could have a geographical nexus with an offence under the laws of the HVNL states when—

- WA has its own work and rest hour requirements and NT has its own recommendations
- In 2017, WA recorded a lower relative risk of fatigue related crashes than NSW or Queensland.[17]

[14] HVNL, s 245(2).
[15] s 245(3). A major rest break means rest time of at least five continuous hours.
[16] Hopkins, M. Letter to ATA CEO Mathew Munro, 7 August 2024.
[17] ATA, May 2019, 6.

Accordingly, the ATA recommends that—

Recommendation 2

A new item, item 62A, should be added to the exposure draft bill to replace s 245 with the following—

> **245 Entering a participating jurisdiction from a non-participating jurisdiction**
>
> (1) This section applies to the driver of a fatigue-regulated heavy vehicle when entering a participating jurisdiction from a non-participating jurisdiction;
>
> (2) Any time spent by the driver in the non-participating jurisdiction before the start of the driver's last major rest break before entering a participating jurisdiction must be disregarded;
>
> (3) The time spent by the driver in the non-participating jurisdiction after the end of the driver's last major rest break must be taken into account; however—
>
> (a) For the purposes of the maximum work hours in a relevant 24 hour period, the work hours must be counted in the relevant 24 hour period following the driver's last major rest break in the non-participating jurisdiction; and
>
> (b) For the purposes of the maximum work period without a rest, the work hours must be counted in the period following the driver's last rest break in the non-participating jurisdiction.

Alternative compliance hours
HVNL Amendment Bill, item 68
HV National Amendment Regulations, items 6 and 19

In August 2022, transport ministers agreed to replace the existing BFM and AFM modules with a graduated alternative compliance scheme based on the Kanofski findings that–

- The NHVR will work with operators to set up flexible scalable certification options/levels within the scheme and corresponding business rules. Operators will present the tools and technology solutions to manage fatigue based on risk.
- Outer legislated limits should be prescribed, aligned with the current AFM outer limits.[18]

[18] NTC, May 2023, 196.

The Decision RIS clarifies that—

> …existing work and rest hour limits for AFM operators will be translated into the future law for the fatigue risk area.[19]

The Kanofski finding is implemented by proposed s 461A(3). It would provide that the alternative compliance hours specified by the regulator must be within the maximum work and minimum rest times prescribed by the national regulations. Those times are in table 1 below.

Table 1: Maximum work and minimum rest times for alternative compliance hours

Total period *In any period of …*	**Maximum work time** *… a driver must not work for more than …*	**Minimum rest time** *… a driver must not rest for less than …*
24 hours	15½ hours work time	7 continuous hours stationary rest time (or in the case of a driver who is a party to a two-up driving arrangement, 7 continuous hours of stationary rest time or rest time in an approved sleeper berth while the vehicle is moving) Note – Despite the rest time of 7 hours continuous stationary rest, the driver may instead have a split rest break in the 24-hour period if the driver has not had a split rest break in the previous 24 hour period. Split rest means (a) 6 hours of stationary rest time; and (b) 2 continuous hours of stationary rest time
	.	

Source: Exposure draft amendment regulations, schedule 1, items 4 and 19.

The outer limits in table 1 do not implement ministers' intent that the existing work and rest hour limits for AFM operators be translated into the future law.

The prescribed outer limits are less flexible than the hours in existing AFM accreditations.

The ATA understands that the proposed regulations would require 24 operators to restrict their operations. The change would affect more than 480 drivers, who would have to spend more time away from home to do the same work.

[19] ibid, 77.

More generally, setting the fatigue outer limits by regulation is inconsistent with the broad goals of the reforms, which include—

- allowing flexibility for industry by focusing on safety outcomes and minimising prescriptive requirements
- establishing technology neutral legislation that recognises innovative solutions, and
- establishing a legislation structure that can keep pace with advances in technology and other changes in context, business operating models and risk management methodologies.[20]

As eminent sleep scientist Professor Drew Dawson pointed out in a letter to the NTC (attachment A)—

> Unfortunately, the proposed changes appear to significantly reduce the opportunity for operators to increase flexibility and safety with an approved accreditation system. Specifically, the hard outer limits around a maximum work opportunity of 17 hours (15½ hours work and 90 minutes rest) and a prescriptive 'split rest' option will be exempt from flexibility in a safety case.
>
> Importantly, there is no published data that justifies this choice, or indicates that doing so will likely improve safety. In my view, the opposite is likely to be true. That is, there is considerable potential to reduce safety and operational flexibility.

In the ATA's view, there is no policy reason to set the maximum work and minimum rest times in regulation.

If it is still considered that ministers should set the outer limits for fatigue alternative compliance, the ATA considers that the best alternative would be for ministers to approve the risk management standard used by the NHVR to determine the conditions of fatigue alternative compliance accreditation.

The risk management standard could—

- specify the risk controls and reporting arrangements that the NHVR would require before allowing drivers to work increased hours or with more flexibility
- set out the patterns of work and rest hours that might be permitted, such as to give a driver extra flexibility to get home at the end of a period away
- provide the NHVR with sufficient flexibility to approve other arrangements based on the use of fatigue and driver distraction technology.

[20] ibid, 39.

Recommendation 3

The exposure draft bill and regulations should be amended to remove the maximum work and minimum rest times that the regulator can set as alternative compliance hours, including the restrictions on its ability to approve split rest break arrangements.

Recommendation 4

If ATA recommendation 3 is not adopted, the bill and regulations should be amended to—

- remove the restrictions on the regulator's ability to set alternative compliance hours and split rest breaks
- provide that responsible ministers may approve a Fatigue Risk Management Standard
- provide that the regulator must set alternative compliance hours and split rest breaks with reference to the standard.

NHVAS safety management system prerequisite
HVNL Amendment Bill items 113-114

The ATA pointed out during the review that NHVAS accreditation did not deliver compliance with the safety duties in Chapter 1A of the HVNL. The extraordinary result is that the NHVR is operating a scheme that does not meet the requirements of its own law.[21]

The Kanofski review recommended that NHVAS should include a safety management system (SMS) core module.[22]

Proposed sections 459 and 461 of the HVNL would implement this policy approach by requiring that applicants for NHVAS accreditation have a safety management system as a prerequisite: a key safety improvement.

The safety management system would have to comply with a new safety management system standard and be audited by an approved auditor.[23]

Most NHVAS operators would need to develop a documented SMS, which would be a cost imposition, although the cost and complexity of the SMS would depend on the risk profile of the business. The SMS for an owner driver or small fleet could be expected to be very straightforward compared to the SMS that would need to be developed by a large, complex business.

[21] ATA, Assurance models: HVNL review issues paper 6. Submission to the NTC, October 2019. 3.
[22] NTC, May 2023, 200.
[23] Exposure draft bill, item 113, inserted sub-paras 459(2)(b)(i)-(ii).

Immediate suspension of heavy vehicle accreditation
HVNL Amendment Bill, item 139

Under s 473 of the HVNL, the NHVR has the power to amend, suspend or cancel a heavy vehicle accreditation after issuing a 14-day show cause notice to the holder. The NHVR can issue a show cause notice on a range of grounds depending on the accreditation involved, as column 2 of table 2 shows.[24]

The NHVR also has the power to suspend an accreditation immediately if it is necessary to prevent or minimise serious harm to public safety.[25]

These two sections create a hierarchy of actions that can be taken by the regulator. The regulator can issue a show cause notice if an accreditation endangers public safety or road infrastructure. But the regulator can go further and suspend an accreditation immediately if there is a serious risk to public safety.

These provisions mirror other transport safety laws.

For example, s 73 of the Rail Safety National Law empowers the ONRSR to issue a show cause notice if it considers that an accredited person no longer has the competence and capacity to manage risks to safety. Section 74 enables the ONRSR to suspend an accreditation immediately if it considers there is an immediate and serious safety risk.

Table 2: Powers of the regulator to suspend or cancel accreditations

Action type	Current HVNL	Exposure draft bill	ATA recommendation
Show cause	*Maintenance or mass* Public safety has been endangered or is likely to be endangered; or Road infrastructure has been damaged or is likely to be damaged. *Fatigue* Public safety has been endangered or is likely to be endangered.	Prevent or minimise a public risk	Prevent or minimise a public risk
Immediate suspension	To prevent or minimise serious harm to public safety.	Prevent or minimise a public risk.	Prevent or minimise a **serious** public risk

Sources: HVNL s 473(1)(e)-(f); s 474(1)(b); Exposure draft bill items 138-139.

[24] HVNL, s 473(1)(e)-(f).
[25] HVNL, s 474(1)(b).

The exposure draft bill would amend the test for a show cause notice to preventing or minimising a public risk,[26] as column 3 of the table shows. This amendment is necessary, because the bill would remove the details of alternative compliance accreditation from the law. The test needs to be broad enough to apply to all the risks that could be covered by accreditation.

The bill would also enable the NHVR to apply the same test to a decision to suspend an accreditation immediately,[27] instead of requiring that the harm be serious.

The ATA does not support this approach. The approach in the current HVNL – not to mention the RSNL and other laws – is appropriate, because a regulator should only be able to suspend an accreditation immediately if there is a serious risk.

After all, it is possible that a regulator that acts without asking questions might misapprehend the safety risks of a business's activities or even suspend the accreditation of the wrong company in a complex contracting chain. These risks are justified if there is a serious risk to the public, but not otherwise.

Recommendation 5

Item 139 of the bill should be amended to insert 'a serious public risk' into s 474(1)(b).

Use of audits of safety management systems in proceedings
HVNL Amendment Bill, item 156

The ATA proposed in the review that parties in the chain of responsibility should be able to rely on a business's safety certification as evidence that the business was compliant with its safety duties and obligations.[28]

The ATA made this proposal to address the tidal wave of compliance audits required by customers and prime contractors.

The Kanofski review recommended, and ministers agreed, to insert an evidentiary provision into the law to make it clear that a court could consider an audit conducted under the audit standard as part of determining whether the primary duty had been met.[29]

[26] Exposure draft bill, item 138.
[27] Exposure draft bill, item 139.
[28] ATA, October 2019, 9.
[29] NTC, May 2023, 201.

Proposed s 632B implements this decision as follows—

> **632B Use of audit of safety management system in proceeding**
>
> An audit of an operator's safety management system carried out by an approved auditor in accordance with the audit standard is admissible in proceedings for an offence relating to a failure to comply with the duty under section 26C.

Section 26C of the HVNL is the primary duty on chain of responsibility parties, but an SMS audit would also be relevant to the prosecution of an executive under s 26D.

Section 26D imposes a due diligence obligation on the executives of legal entities, with the same maximum penalties that apply to individuals contravening the underlying safety duty.[30]

Recommendation 6

Proposed s 632B should be amended so an audit of an operator's safety management system is admissible in proceedings for an offence relating to a failure to comply with a duty under sections 26C or 26D.

Directions in relation to alternative compliance accreditation
HVNL Amendment Bill, item 159

Section 651 of the HVNL empowers ministers to issue directions to the NHVR. A direction must not be about a particular person, a particular heavy vehicle, or a particular application or proceeding.[31]

This section is consistent with regulatory best practice.

Ministers are entitled to implement the policies that they were elected to carry out. They are responsible to parliaments for the performance of the departments and agencies in their portfolios.

Ministers should not, however, be able take over the functions of an independent regulator by making decisions about specific cases.

The draft bill would expand s 651 into five sections. These would generally continue the best practice approach taken by the existing law.

[30] HVNL, s 26D(1).
[31] HVNL, s 651(2).

The exception is proposed s 651B, which would provide as follows—

> **651B Directions in relation to alternative compliance accreditation**
>
> (1) The responsible Ministers may give a direction to the Regulator requiring the Regulator to take or not to take particular action in relation to—
> (a) an applicant or class of applicants for alternative compliance accreditation; or
> (b) an operator or class of operators holding alternative compliance accreditation.

The decision RIS argues that empowering ministers to issue directions about specific applicants or operators would enable them to respond swiftly following serious safety incidents involving particular accredited operators.[32]

This proposed departure from best practice is not justified. If swift action was needed after a safety incident, the safety regulators at the NHVR would be best placed to evaluate the circumstances and act using the powers discussed on pages 10-11 of this submission.

Recommendation 7

Directions issued under proposed s 651B should be restricted to classes of applicants or operators and not specific businesses.

Membership of the NHVR board
HVNL Amendment Bill, items 164-166

In its submissions to the review, the ATA argued that the five member NHVR board was small by the standards of comparable regulators and that its size should be increased.[33]

Under the draft bill, the NHVR board would comprise at least five but no more than seven members.[34] The board members would have the expertise, experience and skills that the responsible ministers considered appropriate.[35] They would not be able to serve on the board for more than three consecutive terms[36] (which could each be up to three years)[37] or more than ten years in total.[38]

The ATA supports these amendments.

We consider, though, that proposed s 663(2A) should be redrafted.

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[32] NTC, May 2023, 96.
[33] ATA, HVNL review consultation RIS: chapter 5: regulatory tools. Submission to the NTC, November 2020. 12-13.
[34] Exposure draft bill, item 164.
[35] Exposure draft, item 165, inserted s 663(2).
[36] Exposure draft bill, item 166.
[37] HVNL, s 665(1).
[38] Exposure draft bill, item 166.

Under this section, a person employed in the heavy vehicle industry or an organisation representing the heavy vehicle industry would not be able to be appointed to the board.[39] This restriction would not apply to a person who was a member of the board at the commencement of the amendment Act.[40]

The policy intent of the ban is presumably to prevent conflicts of interest. The draft section would not achieve this goal, because—

- the NHVR's regulatory responsibilities extend beyond the 'heavy vehicle industry' to include businesses in other industries that operate trucks and buses in support of their own operations, as well as other chain of responsibility parties such as consignors, consignees and loading managers.[41]

- the proposed ban would only apply to employees. It would not apply to non-employee directors or the direct owners of businesses, even though these individuals may have a greater personal stake in regulatory decisions than their employees.

To address these gaps in the section, the ATA recommends that—

Recommendation 8

Proposed section 663(2A) should be redrafted to provide that a person must not be appointed as a member of the Board if the person is—

- a party in the chain of responsibility
- a direct owner of a party in the chain of responsibility
- a director of a party in the chain of responsibility or an organisation representing parties in the chain of responsibility
- employed by a party in the chain of responsibility or an organisation representing parties in the chain of responsibility.

Codes of practice
HVNL Amendment Bill, item 173

Codes of practice are a well-established mechanism for fleshing out the broad general duties in work health and safety and WHS adjacent legislation such as the HVNL.

Under this model, codes of practice provide guidance about how to achieve the principles set out in general duties.[42] A regulated party does not have to comply with a code but must achieve a level of safety equivalent to or higher than the standard in the code.[43]

Section 706 of the HVNL currently empowers the regulator to register codes of practice developed by industry. The ATA and the Australian Logistics Council used this provision to

[39] Exposure draft, item 165, inserted s 663(2A).
[40] Exposure draft bill, item 178, new s 762.
[41] HVNL, s 5 (definition of 'party in the chain of responsibility').
[42] Bluff, E. and N Gunningham. Principle, process, performance or what? New approaches to OHS standards setting. National Research Centre for OHS Regulation. Working paper 9, June 2003. 9.
[43] See, eg, HVNL, s 632A(4); Model WHS Act, s 275(4).

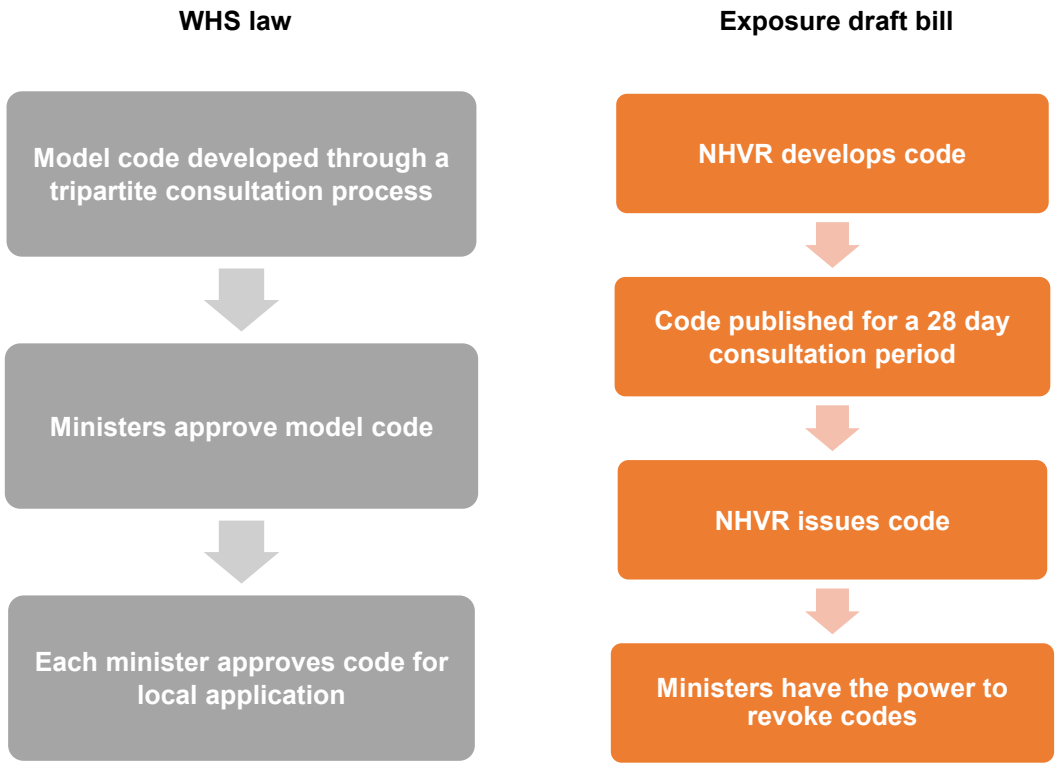
develop the master registered industry code of practice, which was registered in November 2018. The ownership of the code was transferred to the NHVR in July 2024.

Item 173 of the amendment bill would replace the existing approach to developing and approving codes with a new process. The ATA recognises that it is now appropriate to assign responsibility for developing codes to the NHVR rather than industry, but we consider that the item should be redrafted.

Responsibility for approving codes

During the review process, stakeholders generally agreed that the process for developing HVNL codes should be aligned with the WHS Act process. This process is set out in the left hand flowchart in figure 2.

Figure 2: WHS and exposure draft bill code development processes



Sources: Model WHS Act, s 274; Exposure draft bill, item 173.

The code development process in the exposure draft is not consistent with the model WHS Act process, as the right hand flowchart in the figure shows.

It would also be a weaker process. There would be less independent scrutiny, because the NHVR would be responsible for developing codes and then approving its own work.

Although ministers would have the theoretical power to revoke codes, an HVNL state with concerns about a code would have to secure unanimous agreement to get it revoked.

The ATA recognises that the approach in the exposure draft reflects Kanofski reform finding 9.3(a);[44] however, we believe that ministers should reconsider and align proposed sections 705 and 706 with the model WHS Act process as stakeholders originally considered.

Recommendation 9

Proposed sections 705 and 706 should be redrafted so responsible ministers approve codes.

Recommendation 10

If ATA recommendation 9 is not adopted—

- proposed subsection 705(5) should be redrafted to refer to subsection (3)
- proposed subsection 705(6) should be redrafted to refer to subsections (3) and (4).

These changes are to correct minor drafting errors.

Consultation with industry and the public

Proposed section 705(3)(a) provides that the regulator must make a draft code of practice or amendment publicly available for at least 28 days before issuing or amending it. The regulator would need to consider any submissions received during that period.

Similar consultation requirements would apply to revoking a code of practice.

The proposed 28 day consultation period does not align with best practice. The latest Office of Impact Assessment (OIA) guidance is that 30 to 60 days is appropriate for effective consultation, with 30 days considered the minimum.[45]

The accepted practice in the road transport reform space is that consultation documents, including for example these exposure drafts, are released for six weeks.

Accordingly, consultation periods for codes should be increased to a minimum of 42 days.

Recommendation 11

Whether or not ATA recommendation 9 is adopted, the code consultation periods in the bill should be extended to ‘at least 42 days.’

[44] NTC, May 2023, 208.
[45] Office of Impact Analysis, Best practice consultation. Guidance note, July 2023. 7.

4. Penalties

Penalties for minor offences are too high

The ATA and its members argued throughout the review that the penalties for minor fatigue breaches and record keeping offences were too high.[46]

There is little connection between improving safety and minor time counting or record-keeping offences. In fact, it's the opposite. Imposing high penalties for minor offences reduces the willingness of industry participants to focus on safety, not compliance.

Penalties are seen as unavoidable nit-picking

Many truck drivers see the minor offences and penalties under the law as unavoidable nit-picking. Road transport involves unexpected delays, whether it's an interstate journey in a truck or a family road trip. The minor fatigue offences do not recognise this reality.

As one driver told the ATA—

> I started in this industry wanting to learn and aim for 100% compliance and placing my own limits on myself because of my relative inexperience.
>
> After 18 months I feel resentful, consider it is virtually impossible to avoid 'non-compliance' due to the level of petty nit-picking, and find myself as a result, being tempted into avoidance or cheating strategies. I should not feel so afraid of or resentful toward the authorities when I have started out with a determination to do the right thing. This tells me that the current system is counterproductive.[47]

Penalties are too high compared to drivers' earnings and the objective risk

Truck drivers also know that the penalties for minor fatigue and record keeping offences are disproportionate compared to the risk and their ability to earn income.

Table 3 sets out two of the infringement notice penalties for work diary errors and minor fatigue breaches. As can be seen, a grade 6 truck driver on award wages would take five hours to pay the infringement notice penalty for a record-keeping error, even though the error would have zero effect on the driver's crash risk.

The same driver would need to work for 13 hours to pay for a five minute minor fatigue risk breach, even though a five minute breach would have a negligible impact on the driver's crash risk.

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[46] ATA, Reforms to Heavy Vehicle National Law: consultation regulation impact statement. Submission to the NTC, November 2023. 13.
[47] ibid.

Table 3: Selected penalties for HVNL offences and hours to pay

Offence	Infringement notice penalty	Hours to pay
Recording work diary information as required by the national regulations	$200	5
Minor fatigue risk breach: solo driver operating under standard hours	$530	13

Source: HVNL; *Road Transport (Long Distance Operations) Award 2020*, schedule A, hourly payment rate for a grade 6 employee.

Good drivers are discouraged from entering or staying in the industry

The trucking industry faces a shortage of drivers, as the Australian Government's 2024 Occupation Shortage List confirms.[48] The unfairly high penalties for minor offences discourage drivers from entering the fatigue-regulated sector of the industry or can result in them leaving.

One truck driver, Chris, said in 2019—

> I stopped driving trucks seven years ago following two fines I received for 15 minute errors in my old log book that I carried in my truck for 28 days – as per law. On my way from Queensland on a Friday, I got stopped at Goondiwindi and Dubbo by RMS both in one day and fined for separate offences both over one month old. Simple mistakes, well in the past, that cost me a week's wage.[49]

Outcomes of the penalties review

As part of their consideration of the Kanofski review, ministers endorsed a review of penalties across the whole of the law. The review considered 349 offences; it proposed increasing 50 penalties and decreasing 21 penalties.[50]

Table 4 summarises some of the key penalty reductions that would affect drivers.

[48] Jobs and Skills Australia, 2024 occupation shortage list. Truck driver (general), ANZSCO 733111.
[49] Cited in B Magill, *The driver shortage approach – reformed*. Daimler Truck and Bus Future Leaders' Program report, 2019.
[50] NTC, HVNL penalties review: summary of proposed penalty changes. October 2024, 1.

Table 4: Selected penalty reductions proposed by the review

Offence	Existing HVNL	Proposed penalty
Minor fatigue risk breach: solo driver operating under standard hours (HVNL s 250(1))	In law: $4,000 Indexed: $5,300 Infringement notice: $530	In law: $3,000 Indexed: $3,980 Infringement notice: $398
Minor risk breach of alternative compliance hours (s 254 in exposure draft bill; previously s 258)[51]	In law: $4,000 Indexed: $5,300 Infringement notice: $530	In law: $3,000 Indexed: $3,980 Infringement notice: $398
Information required to be recorded immediately after starting work (HVNL s 297(2))	In law: $6,000 Indexed: $8,000 Infringement notice: $800	In law: $4,000 Indexed: $5,300 Infringement notice: $530

Source: NTC penalties review.

The penalties proposed in the review are still too high. The review also did not consider the multiplier for corporate offences, which has a critical impact on the penalties faced by owner drivers.

Section 596 of the law provides that the maximum penalty for a body corporate is five times the maximum penalty for an individual unless the relevant penalty provision has a specific corporate penalty.

Most trucking businesses are very small businesses. 56 per cent don't employ staff at all.[52]

Under these circumstances, the 5x corporate multiplier imposes an unreasonable extra penalty on owner drivers who make the perfectly legal choice to operate as a company rather than work as an employee or sole proprietor.

There is, however, no doubt that the proposed penalties would be fairer to drivers than the current penalty levels. They should be implemented as a first step toward a broader fix.

Reducing the penalties for work diary record keeping offences

The HVNL imposes significant penalties for failing to record work diary information as required by the national regulations.

[51] See ATA recommendation 13.
[52] Australian Bureau of Statistics, Counts of Australian businesses, including entries and exits, June 2019 to June 2023. Data cube 2: Businesses by main state by industry class by annualised employment size ranges, June 2023.

The ATA acknowledges that the exposure draft regulations would remove the requirement for drivers to—

- record the day of the week on each work diary sheet
- record total work and rest hours on each work diary sheet
- tick the 'standard hours' box on each sheet, for drivers working under standard hours.[53]

The exposure drafts would also restructure the penalty provisions for not recording work diary information correctly.

Item 84 in the bill would remove an entire subdivision of offence provisions from the law, but this would be replaced with an expanded regulation-making power[54] and new offence provisions in the regulations.[55]

But the record keeping penalties would continue to be $2,000 or a $200 infringement notice, as column 2 in table 5 summarises.

Table 5: Current and proposed penalties for work diary record keeping offences

Offence	Exposure draft bill and regulations	ATA recommendation
Recording work diary information as required by the national regulations - general (HVNL s 296(1))	In law: $1,500 Indexed: $2,000 Infringement notice: $200	In law: $1,125 Indexed: $1,500 Infringement notice: $150
Recording information in written work diary (Proposed fatigue national reg 20)	In law: $1,500 Indexed: $2,000 Infringement notice: $200	In law: $1,125 Indexed: $1,500 Infringement notice: $150
Recording information in electronic work diary (Proposed fatigue national reg 20A)	In law: $1,500 Indexed: $2,000 Infringement notice: $200	In law: $1,125 Indexed: $1,500 Infringement notice: $150

Breaches of the work diary recording keeping requirements can include—

- failing to draw a vertical line between the 'my work' and 'my rest' bars of a written work diary daily sheet at a work and rest change[56]
- failing to write down odometer readings when stopping at then leaving a rest area at a well-known location, such as a service centre.[57]

Neither of these potential offences have a bearing on fatigue risk or the ability of enforcement officers to understand a driver's work and rest hours. Service centres don't wander up and down the highway.

[53] Exposure draft regulations, schedule 1, items 6-7, 11.
[54] Exposure draft bill, item 82.
[55] Exposure draft regulations, schedule 1, item 12, inserted regs 20 and 20A.
[56] NHVR, National driver work diary. Version 1.3, 2023. 13.
[57] ibid, 14.

Given the low stakes involved, the ATA proposes that the penalties for the work diary record keeping offences in table 5 be reduced to $1,125. As a result, the indexed penalties would be $1,500 and an infringement notice would be $150 (column 3).

A $150 fine would still be a large penalty for failing to draw a vertical line on a form, but it would be more reasonable than $200.

Recommendation 12

Ministers should adopt the recommendations of the penalties review.

In addition, the penalties for breaching s 296 and proposed fatigue national regulations 20 and 20A should be set at $1,125 (an indexed penalty of $1,500 or an infringement notice amount of $150).

Recommendation 13

To fix a drafting error, the penalty for a minor risk breach of alternative compliance hours in proposed s 254 should be set at $3,000 as recommended in the review.

29 October 2024

Mr Michael Hopkins
Chief Executive Officer and Commissioner
National Transport Commission
Level 3, 600 Bourke Street
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mhopkins@ntc.gov.au

Dear Mr Hopkins,

I am writing to raise my serious concerns regarding aspects of the National Transport Commission's (NTC) public consultation draft of proposed changes to the Heavy Vehicle National Law (HVNL).

Overall, my concerns relate to the proposed changes that will unnecessarily constrain how the National Heavy Vehicle Regulator (NHVR) will be able to regulate fatigue in the heavy vehicle sector.

As background, I have a long history with fatigue management in the HVNL. I was a member of the Independent Expert Panel in 2008 that worked with governments and operators to introduce the risk-based approach to managing fatigue safety, based on risk trading and offsets. I am the fatigue subject expert for the Office of the National Rail Safety Regulator. I have also been a global subject expert for the road, rail and aviation sectors in Canada and the US.

I believe there are some positive aspects to the proposed legislative changes:

- I support the transition to a two-tier accreditation system and improvements that require a Safety Management System (SMS) approach to gain access to alternative compliance accreditation.

- the Basic Fatigue Management (BFM) tier has served its purpose and the new approach will allow for a review of the required risk controls for this mode operation.

The challenge here for government is, as often is the case, if the bar is set too high operators will simply choose to give up accreditation and revert to standard hours operations i.e., "go under the radar."

In reviewing the consultation draft, my main concern relates to the proposal to reintroduce and strengthen prescriptive rules. I am at a loss to understand this inclusion which will reduce the incentive for operators to adopt a safety and risk-based approach and has the potential to take the safety cause back 20 years.

I work extensively with transport regulators globally on the many challenges relating to fatigue management and this approach is in marked contrast to other transport sectors and workplace safety regulation.

Since the pivotal UK Robens' Report in 1972, safety regulators globally have recognised that compliance with prescriptive rules does not necessarily improve safety and that many prescriptive rule-sets can result in paradoxical safety outcomes. The research evidence and industry experience clearly support this trend.

The Parliamentary enquiry 'Burning the Midnight Oil,' published in 2000 was also a turning point for regulators who since this time have consistently reduced and/or eliminated their reliance on 'compliance' based safety systems.

All Australian transport regulators have introduced safety-based regulatory regimes where companies who need the operational flexibility to work outside the prescriptive limits, can present a 'safety case' demonstrating how they will control the additional risk.

The use of alternative compliance options with a 'reversal of the burden of proof' for the safety case has been the essential foundation of fatigue management in Australia for more than two decades. This has seen Australia globally recognised as the leader in fatigue safety regulatory reform and is an option in the current HVNL.

Unfortunately, the proposed changes appear to significantly reduce the opportunity for operators to increase flexibility and safety with an approved accreditation system. Specifically, the hard outer limits around a maximum work opportunity of 17 hours (15½ hours work and 90 minutes rest) and a prescriptive 'split rest' option will be exempt from flexibility in a safety case.

Importantly, there is no published data that justifies this choice, or indicates that doing so will likely improve safety. In my view, the opposite is likely to be true. That is, there is considerable potential to reduce safety and operational flexibility.

My second area of concern is that the legislation does not explicitly acknowledge the importance of 'shared responsibility' to fatigue management. In some cases, the information necessary to determine a driver's fitness-for-duty may not be readily available to one or other party in the decision (i.e., driver and manager).

Where a driver or manager believes it is not safe to continue driving that decision (to stop driving) should be binding for either party until the driver has recovered sufficiently to continue safely.

Flexibility to manage work and rest time is critical in empowering these safety decisions to be made together. These breaks should not be prescriptively defined but rather left to be agreed within the scope of the accreditation approval as is now the case.

Ironically, this approach does not usually lead to more driving time but rather a safer balance between work and rest to match the circumstances.

My third area of concern is the failure of the proposed changes to anticipate the technological advances already occurring which will inevitably continue over the next few decades.

Operators are already rapidly adopting new technologies that are providing far more valuable risk management tools than counting hours will ever do. This includes electronic work diaries, computer-assisted and monitored driving behaviour and fatigue detection and distraction technologies which are already fundamentally altering the fatigue risk profiles associated with working time arrangements.

We will no longer rely on log-book compliance with driving hours as a crude proxy for determining (acceptable) fatigue-related risk.

With these technologies in place, possible fatigued driving will often be clearly identifiable when it occurs and, importantly, when it does not. Operators will have this data in a quantitative form, often in real-time, so fatigue risk management will be direct and the tenuous link between fatigue risk and the working time arrangements will become salient to drivers, operators ***and*** potentially to regulators.

I think it is critical that the NTC reflect carefully on the proposed changes and the evidence base upon which they are predicated which I have stated previously, is contrary to the extensive published research in this area.

Given the weight of evidence suggesting that the proposed changes are, at best, counter-productive, I would urge the NTC to reconsider their position. In my view, it would be possible to avoid the negative impacts of the proposed changes and to significantly future-proof the legislation through some minor changes to the proposals.

To do this, I would suggest-

(1) retaining the proposed two-tier system of standard hours and an 'alternative compliance' option. To reduce the regulatory and compliance burden, the regulator and relevant industry associations could co-design realistic 'templates' that could be easily 'adopted' and 'approved' This will be critical given the large number of operators currently in the BFM tier.

(2) removing the "set in concrete" outer limit proposals in particular the work opportunity and split rest outer limits to allow safer and more flexible alternatives to be proposed.

(3) that an operator choosing the 'alternate compliance' pathway be required to develop a safety case that demonstrate the controls the company employs to manage delays and other challenges that arise in an ad hoc manner i.e. they do not schedule to work more hours but to manage things that occur outside of their control.

(4) that where the additional risk is deemed sufficient, that an operator be required to provide 'post-hoc' monitoring data that demonstrates that their operation has achieved the required level of safety.

(5) the proposed reforms explicitly acknowledge the changing technological environment for drivers and the decreasing relevance of the working time arrangement as a proxy for fitness-for-duty vis-a-vis fatigue risk. Specifically, the law should recognise that fatigue detected directly is at least as good and probably better as a proxy for fitness-for-duty.

(6) as proposed, introduce an 'absolute authority to stop driving.' Where an employee or manager believes it is unsafe for a driver to continue driving the driving must cease until the employee is again deemed fit-for-duty. This action should be interpreted within a just-culture framework and form part of the information informing the safety management system.

Regards

Prof Drew Dawson

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Australian Trucking Association, other industry bodies and relevant AFM companies