



SUBMISSION TO THE NATIONAL TRANSPORT COMMISSION

NATIONAL HEAVY VEHICLE LAW REVIEW 2019

Issues Paper: Effective Fatigue Management

I am the Director of Straightshot Transport, a small business based predominantly in New South Wales, that carries & tows medium size items (eg boats, caravans, horse floats) throughout Australia, but specialising in the east coast of Australia. In February 2019, I was elected as the Small Business representative on the Australian Trucking Association Council. I have been very privileged to have been included in a number of discussions relating to the Fatigue Management Issues Paper submitted by the ATA.

Straightshot Transport has only been operating since 2012, however in this time, I have forged some very strong relationships with many Owner Drivers and small businesses in diverse range of industry specialities. While I am not currently driving, I am in constant contact with many drivers and small transport businesses that need to understand and comply with the legislated requirements for fatigue regulated vehicles - including my partner that has been driving heavy vehicles for more than 35 years. It is from this perspective that I respond to the Effective Fatigue Management Issues Paper

I also acknowledge that the goal of the Review of the HVNL is to create an entirely new law after addressing the issues that have been identified with the current law(s). With this in mind, I wish to comment on a number of questions posed in the paper.

1. How can we change our approach to fatigue management so we reduce fatigue-related incidents and deliver Australia's road transport task efficiently and safely?

Currently, the states & territory operating under NVHL measure and enforce fatigue from a punitive perspective rather than from a risk based model. Drivers and schedulers are required to manage fatigue on a stop watch instead of on a needs and risk based approach.

The current laws were introduced to protect drivers from pressure to work excessive hours by unscrupulous employers and themselves. The prescriptive requirements have actually resulted in drivers being “forced” to drive within the confines of the allowable driving time according to the Work Diary.

Despite the introduction of the prescriptive requirements, fatigue related collisions remain relatively unchanged since 2009 according to the National Transport Accident Research Centre.

Drivers are under a great deal of pressure from employers and/or customers to deliver items in the quickest time possible, so if the driver is actually fatigued but NOT required to rest according to the rules, they actually try to “push through” the fatigue until they have to take their next required rest break. They are prepared to take the risk with their own safety, and the safety of other road users, than risk major fines and potential loss of license because they have driven over the legislated time due to resting in the permissible driving timeframes.

This process does NOT reduce fatigue, but does increase revenue for the authorities when they check work diaries, sometimes weeks AFTER the fatigue may have been an issue.

You will no doubt receive this message many times in other submissions, however flexibility in the driving timeframes needs to be a priority. I do not believe more driving hours is necessarily needed, however a driver needs to be able to use the permissible working time according to their own needs rather than the needs of others, including customers and/or employers.

2. What fatigue risks that are currently out of scope for the HVNL should be brought into scope? What is in scope that shouldn't be?

While Chain of Responsibility requirements are a component of this process, it appears that the application of the requirements leave a lot to be desired thanks to the prescriptive requirements of fatigue management. I have struggled to find many real instances of prosecutions for others in the Supply Chain that meet the intent of Chain of Responsibility requirements¹. Instead I find many instances of administrative breaches, such as record keeper not keep records, but substantial contributing factors like delaying drivers loading and/or unloading remains unchecked. These delays in the supply chain contribute to frustration & risky behaviour by drivers attempting to “catch up” for the lost time so their driving plan is not thrown out for the whole week.

The prescriptive requirements under the current HVNL enables easy application for administrative breaches under CoR, but a lack of thorough investigations for major contributing factors.

¹ NHVR website <https://www.nhvr.gov.au/law-policies/court-outcomes>

One recent court matter that epitomises this is the matter at Sydney Central Local Court against the business A. Fife & Co and its director Peter Fife. Charges were laid for 24 offences under the Heavy Vehicle National Law (HVNL) after a double fatality involving one of their drivers. Offences related to multiple driver fatigue and breaches of CoR under section 261(2)(a) and 13 offences for not recording change of activity, section 315(2)(a). The presiding magistrate found none of the breaches contributed to the collision.

Any future heavy vehicle laws need to address real-time safety and preventative action rather than reactive applications of the laws for administrative errors.

3. What are the key risk factors associated with long hours, night shifts and other work schedule factors? How do we account for the fact that not all work hours have the same risk without introducing excessive complexity?

I believe this question has been more than adequately addressed in Australian Trucking Association and NatRoads submissions on this issue paper, with which I agree.

4. How should a new HVNL address driver health and lifestyle factors? What kinds of controls could be effective?

Given the number of small businesses and owner drivers in the industry, I believe many of these businesses would not have a robust set of policies and procedures in place that identifies declining health once a driver is licensed. I believe licensing should require an appropriate and standardised medical assessment for every renewal, with more stringent medicals being required where the driving task is a higher risk to the driver and community at large eg: transporting dangerous goods, an advanced fatigue management accreditation, etc.

I have reservations in requiring additional medical assessments being mandated each time a driver starts a new job unless the new role poses a greater risk as identified above. This is a financial impost that I believe would be unnecessary should more regular medical assessments be required in the licensing process. One suggestion could be that the driver obtains a medical “Certificate of Currency” every two years if it is not aligned with license renewals.

I also believe that legislation and or guidance material for the new law should include mandatory notifications for relevant health concerns to an appropriate authority, eg: from a doctor to the Regulator or relevant Road Transport Authority, should a person’s health deteriorate and would impact on their capacity to work safely for themselves or others.

5. How do we ensure the HVNL is agile enough to adopt best practice fatigue management as it emerges? How do we encourage continuous improvement? Can training help?

Should the new laws include the simplified Act with Regulations and Guidance notes? I believe changes & emerging research and technology can be accommodated more easily in this way.

Training is an essential component for continuous improvement with all stakeholders. The training, however, needs to be delivered in a multitude of ways to enable easy access and comprehension of the information.

It has always been a struggle to engage with the majority of small transport businesses, Owner Drivers and the stakeholders that use heavy vehicles to transport their goods. Having spoken with many in this target area, I am told people don't know where to look or who to ask about matters. It is further complicated because they can't, or don't, access information easily, and they don't know what they don't know.

Time is another crucial factor in accessing information. SMB's & Owner Drivers work very hard and struggle to find additional time to look at what is happening, or what has changed.

Fatigue training is clearly available on the internet in various locations, with various providers and other forms (eg: social media), and on a multitude of websites. The content, however, assumes that those that need the training, or re-training, know how to search using technology, and that they have a level of literacy that they can comprehend the multiple scenarios that are covered in writing and/or video. Given the difficulties that courts have had understanding the current legislative requirements, it should come as no surprise that businesses and individuals struggle to be 100% compliant, and enforcement bodies also get it wrong at times.

Training needs to be made as simplistic as possible and user friendly, including ease of access and engagement with the "coal face". Short, relevant titles with prompts to relevant info (written & video) would encourage more to look and/or ask questions. The KISS principle is one that seems to be lacking in the current info-sessions or training material – particularly for those with poor literacy levels. I would like to make the clear distinction between poor literacy skills and those lacking intelligence. Poor literacy skills is not a reflection of a person's ability to be intelligent and have valuable contributions to the industry.

I believe one of the contributing factors for the low uptake of BFM (5.14%) & AFM (0.12%) is the complexities involved in being accredited and having to be accredited by different bodies for different purposes, in different jurisdictions with the corresponding auditing requirements by each duplicating the same or very similar requirements.

6. How can we better accommodate emerging technologies? How can the new HVNL get the best value from technology and data? Do you think fatigue monitoring technology can supersede work and rest hour requirements?

Fatigue monitoring technology should only be used as an assistance tool and should not be used to supersede work and rest hours. Like all technology, when we become reliant upon it, there will always be repercussions down the track, particularly if it fails.

EWD's will form a major component with fatigue monitoring, however it still has similar limitations as the current book format – it does not stop a driver from being fatigued, it only records whether or not the driver is staying within the legislated requirements. As a result of this, other technology would probably also need to be considered to give real time data on a driver's state of wakefulness?

Taking into account research and development, it is important to look more broadly than just the short term benefits. Eye Safety Related to Near Infrared Radiation Exposure to Biometric Devices² article identifies different risks with using LED sources to read the retina & eye movement (one of the major characteristics used when identifying fatigue).

While there has been more research done since this article was published, it is very concerning that there have been instances recently where drivers have ended their shifts with blinding headaches, which only started for them when they started using fatigue monitoring devices that measure eye movement.

While I am very cognisant of the fact that some drivers will simply not use fatigue monitoring type technology because they know they are often fatigued, there are some very legitimate concerns about the use and abuse of technology – on both an employer's and driver's side. I believe further comprehensive investigations and consultations need to be undertaken. With the growing trend of data hacking and unlawful data sharing, there would need to be some very robust requirements on security and privacy for additional technology to be acceptable to the masses which would in turn increase the uptake.

7. How can the new HVNL meet the needs of all Australian states and territories? What should the new HVNL adopt from Western Australia and the Northern Territory, other transport modes and other industries' fatigue management approaches?

I believe the needs for all Australian states and territories are the same – greater safety for all road users while maximising efficiency for the transport industry. The differences between the states and territory that have adopted the HVNL and Western Australia and Northern Territory appear to be about compliance issues. The current HVNL prescriptive requirements are a simple way for enforcement bodies to issue fatigue related infringements without a driver being fatigued, and allows drivers to drive when fatigued, with the enforcements bodies having to prove the driver was actually fatigued.

To get all states & territories on the same page, there needs to be a simple common goal to meet the desired outcome – safer roads while maintaining efficiency in the transport industry. Revenue and enforcement are secondary to the primary goals.

² <https://pdfs.semanticscholar.org/508a/fd1013922bed702b5eeb82fb1a800a572f10.pdf>

8. Are prescriptive rules desirable in a new HVNL? If so, how can we simplify rules in the HVNL to make them easier to understand so that they're easier to comply with?

Given the criticism of the prescriptive requirements in the current HVNL, I believe there is still a place for some prescriptive rules. There continues to be concerns that small business operators and Owner Drivers may not have the skill or capacity to implement a safety based fatigue management plan. To provide the required flexibility drivers need to actually manage their fatigue, a set of Guidelines can be produced by industry experts to use instead of a risk based management option.

The clear Guidelines, which would need to be simpler than the current requirements, will also need to include some limited capacity for flexibility. An example of this flexibility is a driver that is 30 minutes from their destination and they have run out of hours for the 24 hour period. Is it safer for the driver to continue for that period of time to ensure they get to a safe destination that will ensure a better rest break than if they are required to pull over where they are and twiddle their fingers for the next 7 hours with poor quality, if any, rest.

9. Would the compliance options described in section 4.5 be a more effective approach to regulating fatigue management? If so, what should be included in the new HVNL, its subordinate documents, or elsewhere, such as in work health and safety laws? How would the appropriate fatigue management option be allocated to an operator – by self-selection or other means?

The workplace safety already falls under the Model WHS 2012 legislation in the relevant states & territories and fatigue management could easily sit inside the WHS management processes for the Person Conducting a Business or Undertaking (PCBU) and Officers duties, and be managed in a systematic way, along with all other safety risks.

Industry can still develop and provide guidance on best business practice and a Transport Industry Code of Practice on fatigue. I believe this would assist by using a standard framework that is a consistent format and approach across all risks and hazards in the business or undertaking.

As with all risks that must be assessed under the WHS legislation, the PCBU (Operator), and Officers of the PCBU, have a number of obligations and duties under the Model WHS Act 2012 that are not transferable. These duties include the primary duty of care to ensure the health and safety of workers while they are at work in the business or undertaking. A PCBU is also responsible for ensuring work carried out does not carry risk to the health and safety of others. This term “others” includes contractors and other persons that the PCBU may come into contact in the course of their work.

Each PCBU (Operator) in the Supply Chain has the same duties, which means there could be more than one PCBU that need to consult with each other to provide safe systems of work – AND REST!

The management of the tasks may be carried out by appropriate people within the business or undertaking, however the PCBU is still ultimately responsible for the fatigue risk and ensuring there are appropriate & adequate measures in place to minimise or eliminate that risk.

Given the WHS legislative framework already attributes the duties to an Operator, there would be no additional requirement to allocate an appropriate fatigue management option.

The risk based option of managing fatigue aligns with Section 4.5, Principle 5 in the NTC issues paper by allowing flexible compliance options that enable operators to comply in a way that best meets their needs.

Despite the above consideration, this option would not work equally should Western Australia decide to adopt the new Heavy Vehicle laws as they have not adopted the Model WHS Act 2012.

10. Should the new HVNL give operators the option of taking full responsibility for risk management? What would be the roles of the regulator and roadside enforcement in such a system?

I do not believe it would be appropriate to have an option for Operators to take full responsibility for policing their own risk management. While larger organisations and businesses have the opportunity to have specialists manage each component of the business, Owner Drivers and SMB's do not have that same capacity. As a small business owner, I have already counted more than 950 pieces of legislation that I need to be compliant with. While this includes variations of the same Acts and Regulations for the different states and territories my business operates in, it would be ludicrous to allow me, or any of the businesses I work alongside of, to have the capacity to self-manage current and future laws unchecked. Without the specialist knowledge, when cracks appear, it is important to identify it quickly to minimise the risk and potential damage.

Even large organisations that have many specialists can fail in some respects.

Changes in legislation, Codes of Practice, Guidance Notes etc change and it is near on impossible to ensure every change is identified and applied in every business. It is important that the Regulator and enforcement bodies monitor and address shortcomings in businesses and/or the industry that are trying to do the right thing, but more importantly for those that try to flout the laws and put other people's lives at risk.

11. How can we get the best overall value from a compliance and enforcement strategy for fatigue management? How are scarce resources best allocated, and what tools do regulators need? What provisions in the law do operators need?

The inception and subsequent adoption of the current NHVL was done so in an attempt to make our industry and the roads safer, and make poor operators and drivers accountable for their actions. The problem that has arisen, however, is the prescriptive requirements have enabled enforcement bodies to apply the NHVL in their own way, and inconsistently with each other and the policies, guidelines and manuals the NHVR use.

Additionally, the attention given to the administrative offences under the legislation appears to have had an incredibly detrimental effect on relationships between the policing bodies and the Transport Industry. The NHVL is being used as a big hammer and revenue raising exercise as the penalties imposed for inconsequential and non-safety related matters have been applied with zero tolerance.

Issues like:

- Driver forgetting to write their name on the top of the page
- Driver forgetting to circle the day of the week even though the date on the page is correct, the day & date on the previous and subsequent page is correct
- Driver forgetting to sign a page off despite the Work Diary being issued to, and used by, one person only
- Minor errors or breaches up to 28 days before, or longer if the driver accidentally leaves an old work diary in the truck
- Businesses receiving multiple fines for the record keeper not checking every work diary page from ALL drivers or sending non-conformance reports for pages they receive up to 14 days after the alleged breach.

None of these offences (or numerous other offences) directly affect safety, but hamper productivity and efficiency in a very tight margin industry.

As an Operator, I need to see consistency in the application and enforcement of the legislation by all enforcement bodies. This may be able to be addressed by including in the new laws that the relevant authority must act in accordance with the Regulator's policies & guidelines when applying the Heavy Vehicle laws.

I need to see that the draconian application to the letter of the laws are addressed on behalf of the industry by the Regulator. This MAY be achieved by setting up an independent arbitrator that reviews infringements issued under the NHVL for minor offences, and before the matter is set to go before the courts.

This could have a multi-pronged effect, as the Arbitrator would be able to:

1. Identify if the same Company and/or Driver keeps coming before them and potentially address systemic failures in their business
2. Identify inconsistent applications of the HVNL by the different policing authorities and address those inconsistencies
3. It could save many wasted days and substantial cost for drivers and businesses that would otherwise have to go directly to the criminal court system, and have to attend the relevant court identified by the prosecuting authority. This could be anywhere in the country that has adopted the HVNL, regardless of ease of access for the person defending the matter
4. Use the data collected by this process to target additional training and/or changes required to Guidelines or Codes of Practice in a more timely fashion, effectively cutting the amount of time poor practices can continue in the industry

12. What else would you like to tell us about effective fatigue management?

It must be foremost in ALL people's minds that managing fatigue for every single person is unique for each one. While broad rules can be applied, it is essential to retain some flexibility to meet the needs of the people most at risk – our drivers.

Angela Welsh
Director
Straightshot Transport