



NATIONAL ROAD TRANSPORT ASSOCIATION

**Submission to the National Transport Commission**

**Issues Paper: *Effective Fatigue Management***

**22 July 2019**

## Introduction

1. The National Road Transport Association (NatRoad) is pleased to make comments on the Issues Paper entitled *Effective Fatigue Management*<sup>1</sup> released by the National Transport Commission (NTC) in late May 2019. The Issues Paper is the second in a series that informs the current review of the Heavy Vehicle National Law (HVNL).<sup>2</sup>
2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, car carriers, as well as tankers and refrigerated freight operators.
3. This submission responds to the questions posed in the Issues Paper. We indicate in bold the specific questions from the Issues Paper that we have answered. We briefly set out the problem with fatigue incidents and the administrative requirements of the fatigue management law before answering the specific questions.
4. We have previously criticised the current fatigue management laws in the initial submission that was made to the NTC on the first issues paper published in the HVNL series<sup>3</sup> (the First Submission). In addition, we have consulted informally with the NTC and provided case studies of less-than-optimal outcomes from the current fatigue regime which have been published in the Issues Paper. We note that the Issues Paper contains draft principles for the design of a new law. In this submission, these principles are discussed when the question(s) that relates to their formulation is answered.
5. NatRoad has also voiced its support for the Western Australian (WA) system of managing driver fatigue in other communications to the NTC, including in the First Submission<sup>4</sup>. We note that the WA system is summarised by the NTC in the Issues Paper.<sup>5</sup> The WA system of fatigue management regulation is made under the WHS legislation in force in that State supported by a specific code of practice for all commercial vehicle drivers. NatRoad submits that a re-designed HVNL should follow the WA model.

### The Problem: Have Fatigue Based Incidents Reduced?

6. The Issues Paper shows that fatigue incident levels have remained relatively constant over the past eight years.<sup>6</sup>
7. Although there should be further study, there appears to be no measurable beneficial effect of the passage of the HVNL in controlling the risk of fatigue related incidents. Yet the HVNL has a very large number of highly prescriptive provisions purportedly directed to the control of the risk of driving whilst fatigued, centred around a range of pedantic administrative rules that are often the focus of enforcement efforts. The underlying dysfunctional aspect of the current laws is that a driver is able to comply with the prescriptive rules yet still be impaired by fatigue. The law must be changed.

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<sup>1</sup> [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.ntc-hvlawreview.files/3315/5807/6049/Final\\_fatigue\\_issues\\_paper\\_for\\_release\\_17\\_May\\_2019.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.ntc-hvlawreview.files/3315/5807/6049/Final_fatigue_issues_paper_for_release_17_May_2019.pdf)

<sup>2</sup> <https://www.ntc.gov.au/heavy-vehicles/safety/review-of-the-heavy-vehicle-national-law/>

<sup>3</sup> <https://www.ntc.gov.au/media/2060/ntc-issues-paper-risk-based-approach-to-regulating-heavy-vehicles-warren-clark-national-road-transport-association-natroad-may-2019.pdf>

<sup>4</sup>Id at para 25

<sup>5</sup> Above note 1 at pps 23-25 with comparative data in Appendix A

<sup>6</sup> Above note 1 at p 29

8. National Transport Insurance data reported on by the National Transport Accident Research Centre<sup>7</sup> (NTARC) shows that there has been a consistent level of fatigue incidents as a proportion of large losses from 2009 to 2017. This figure was at 10% in 2009 and 9.8% in 2017, after having increased in the supervening years.<sup>8</sup>
9. The problem appears to be in part related to a lack of training about fatigue management, as indicated in the Issues Paper.<sup>9</sup> We note the statement in the Issues Paper, however, that says “drivers that operate under standard hours do not need to complete fatigue management training.”<sup>10</sup> Under the harmonised work health and safety legislation, a PCBU must ensure so far as is reasonably practicable the provision of information, instruction, **training** or supervision to workers needed for them to work without risks to their health and safety and that of others around them.<sup>11</sup> The necessity for proper training seems a misstep in communication about the requirements of the WHS laws, a further rationale for the better integration of the WHS laws and the HVNL as set out in the First Submission.

### **Administrative Requirements are a Drag on the Industry**

10. Attachment A contains a case study. It is an illustration of how the administrative requirements that are imposed on the heavy vehicle industry represent a powerful disincentive to workers. It also shows a further example of the problems with enforcement under the HVNL that NatRoad emphasised in the First Submission.
11. The issue of Notices to Produce mentioned in the case study is one that is ongoing.
12. NatRoad members have rightly complained about the administrative burden placed on them in responding to Notices to Produce issued by the Safe-T-Cam system. Where there is no infringement issued members assessed a red tape cost of approximately \$200 per Notice to effectively monitor and respond to the Notices to Produce that the system automatically generates.
13. NatRoad has provided submissions to the NHVR and to RMS on this issue. The feedback received is that members should individually approach RMS to alleviate the burden where this is a regular occurrence but that there is no systemic solution to the problem in play.
14. In addition, the Safe-T-Cam system has recently been used to generate offence provisions where Road Rule 127 is at issue, relating to minimum distances between long vehicles, a matter raised in paragraph 48 of the First Submission. The camera system appears to be applying the Rule in a strict sense, ameliorated by a level of administrative discretion that is not publicly available. The distances set out in the road rule are often not able to be maintained when, say, light vehicles in front of two following heavy vehicles might slow and/or turn. The strict application of the requisite distances measured via camera seems overly prescriptive, especially when compared with the test in Road Rule 126 which is practical and which, as we indicated in the First Submission, should be adopted for all vehicle types.

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<sup>7</sup> NTARC *Major Accident Investigation Report 2019*

<https://ntilimited.imagerelay.com/share/f509b79ae5124f34a8cc509e94057f9b>

<sup>8</sup> Id at page 17

<sup>9</sup> Above note 1 at p32

<sup>10</sup> Ibid

<sup>11</sup> Sections 19-28 model WHS legislation summarised here <https://www.safeworkaustralia.gov.au/doc/guide-model-work-health-and-safety-act> see page 7

15. In examining fatigue management reform, enforcement through the camera system and its unfair administrative burden must also be considered. One solution to the problem might be a recognition in the camera system's software program of the different levels of fatigue management (currently standard, BFM, AFM) that could be reflected in a number plate that is tailored to reflect the operator's fatigue management system. Special attention also needs to be paid to situations where two-up driving is caught by the camera system. Perhaps a pre-registration system or notification system for this approach could be considered.

**Question 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?**

16. The question speaks to a change of approach. Administrative controls don't work to optimally manage fatigue. There must be a focus on outcomes. The WA system has the capability of delivering a more outcomes focused approach as it applies the WHS laws. These laws are already used to deal with serious WHS issues in the heavy vehicle industry even outside of WA.<sup>12</sup> The article cited in support of the proposition just made shows how a PCBU accused of failing to eliminate or minimise traffic risks, in the lead up to a fatality, was permitted to enter a \$1.5 million enforceable undertaking (EU) in lieu of prosecution for category 2 WHS breaches.
17. The WA approach has not been the subject of sufficient comparative study against the regimes operating in other jurisdictions. But the NTARC data for 2017 show that WA was exactly on the national average for fatigue incidents when corrected for their proportion of the freight task.<sup>13</sup> The more stringent enforcement regime experienced by members in NSW has not resulted in a reduction of fatigue incidents with NTARC reporting that NSW "is now just short of hosting two out of every five serious fatigue incidents."<sup>14</sup> Yet NSW has a harsh compliance regime over administrative matters, an issue raised in Attachment A and arising from members' experiences communicated anecdotally to NatRoad.
18. NatRoad agrees that fatigue management should be extended, as in the WA system, to commercial drivers. Commercial drivers are defined by reference to work hours that place the driver in risk areas that are traversed by the NTC in the Issues Paper that is those who drive:
- more than 60 hours per week; or
  - more than once a week is more than 10 hours in a 24 hour period or
  - more than once per week, work time includes the period from midnight to 5.00am.
19. As explained in the relevant Code of Practice<sup>15</sup> (the Code) the regulations and the Code extend to a larger number of stakeholders than are currently targeted under the HVNL. Given the percentage of light vehicle drivers who are at fault in a fatality involving a heavy vehicle being consistently over 80%<sup>16</sup>, this extended scope is supported. We are not aware of any statistics which separate commercial drivers of light vehicles from other fatality

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[https://www.ohsalert.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=55241&utm\\_source=instant+email&utm\\_medium=email&utm\\_campaign=subscriber+email&utm\\_content=read+more&utm\\_term=PCBU%20escapes%20prosecution%20with%20EU%20targeting%20fatigue](https://www.ohsalert.com.au/nl06_news_selected.php?act=2&nav=10&selkey=55241&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=read+more&utm_term=PCBU%20escapes%20prosecution%20with%20EU%20targeting%20fatigue)

<sup>13</sup> Above note 7 at p18

<sup>14</sup> Ibid

<sup>15</sup> [https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cop\\_fatigue\\_management.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cop_fatigue_management.pdf)

<sup>16</sup> Above note 7 at p 8

victims. That research would be instructive. NatRoad strongly supports greater research into road traffic incidents.<sup>17</sup>

20. The WA Code has an inclusive list of those who are likely to be bound to the fatigue management laws as follows:

- employers with employees or contractors who drive commercial vehicles as part of their work;
- self-employed people who drive commercial vehicles as part of their work;
- managers who manage systems of work where employees and contractors drive commercial vehicles as part of their work;
- supervisors who supervise those drivers; and
- employers and employees who drive commercial vehicles as part of their work.

21. Commercial drivers must:

- drive in accordance with the commercial vehicle operating standard; and
- hold a current medical certificate that confirms his or her fitness to drive a commercial vehicle (valid for 3 years).<sup>18</sup>

22. The shared responsibility and the use of the general WHS laws to spread the coverage are changes that should underpin the re-designed law. The medical assessment should, however, not last for three years but should be an annual requirement or on direction by an employer. At the least, the test should be annual for those who are over 49 years.

23. Accordingly, in relation to draft principle 1 set out in the Issues Paper as follows:” The new HVNL should reduce fatigue-related incidents for drivers and other road users. At the same time, it should effectively support Australia’s transport task” we suggest that the following change be applied to this draft principle:

“The new HVNL should aim to reduce fatigue-related incidents for drivers and all road users. It must also effectively support Australia’s transport task by reducing the administrative burden placed on industry participants.”

**Question 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?**

24. The Issues Paper proposes that “The new HVNL should apply to all types of operations where unacceptable fatigue risk exists.”<sup>19</sup> NatRoad agrees. That is why we propose that the fatigue regime extend to all commercial drivers and operations where commercial drivers work. The nature of the work hours that place them in this defined category reveals the need for planning to manage the assumed fatigue risks that accompany those hours: see paragraph 17 above. The issue of fitness for work raised by this fatigue proposal will be considered in the context of a subsequent NTC Issues Paper.

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<sup>17</sup> Explored in detail here <https://www.natroad.com.au/resources/increasing-safety-road-transport-towards-zero>

<sup>18</sup> Summarised here <https://www.commerce.wa.gov.au/worksafe/fatigue-management-commercial-vehicle-driver>

<sup>19</sup> Above note 1 at p 45

25. NatRoad also agrees with the Issues Paper conclusion that “Compliance provisions in the new HVNL should complement work health and safety laws and chain of responsibility provisions. These require all parties to safely manage the fatigue risk to drivers and public safety.”<sup>20</sup>
26. Extending those subject to the new fatigue management regime to commercial drivers and those that control operations where commercial drivers are engaged or employed extends the parties who would be covered by the new regime. That is an extension that is critical for the future.
27. The current highly detailed work diary requirements should be abandoned. The records to be kept should not be defined with the same level of detail as currently exists in the HVNL. The following is from the WA Code and NatRoad supports this form of record keeping:
- There is a requirement for the record to be “set out in a clear and systematic manner”. As there are no prescribed forms or standard record keeping books for this purpose, the format of the record could be varied according to the type of workplace and the nature of the work. Where records are electronic, there should be a back-up copy in case the record is lost. Security measures should ensure the records are not altered.*<sup>21</sup>
28. So long as the records are “clear and systematic” those who seek to enforce the law have sufficient material against which to make an appropriate check rather than focusing on details that do not bear on the risk sought to be controlled. The form of the record should be irrelevant so long as it is accessible and able to be understood. So, any record that has the characteristics of being clear and systematic should be within the scope of the law.
29. We note also that the Issues Paper indicates that the new HVNL should encourage safe practices. We support accreditation of technology neutral fatigue systems (e.g. the use of in-cab monitoring systems) where the operator would be given flexibility in the way that outer limits of fatigue hours or rest breaks might apply where circumstances warrant.
30. The law should also recognise that flexibility is often required because of the particular situation. One circumstance might be where a rest area where the route plan aimed to have the driver stop was full and so the driver was required to drive to a rest area or town that accepted heavy vehicle parking instead of resting at the planned stop. If the drive to the next rest area took the driver over the outer limit for hours, this should not be a breach of the fatigue laws. Similarly, if a driver is a short distance from their home, where they will obviously get better rest, they should not be required to take a break so long as they are not impaired by fatigue.
31. NatRoad agrees that linking of other work with the work time counted under the current fatigue regime may lead to “unsafe practices”. The Issues Paper says that “work or driving done in a heavy vehicle that isn’t fatigue-regulated does not count towards work hours under the HVNL. A driver could do a full shift of other work, or driving, and then climb behind the wheel of a fatigue-regulated vehicle to start their shift – and still comply with the law.”<sup>22</sup>

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<sup>20</sup> Ibid

<sup>21</sup> Above note 15 at p 16

<sup>22</sup> Above note 1 at p 30

32. NatRoad supports including all work time in the outer limits of the work hours that are considered a maximum under the new fatigue laws (again invoking the WA model in this context.)
33. Accordingly, NatRoad endorses Draft principle 2 which is as follows: “The new HVNL should clearly link the legal requirements for managing fatigue to the known risks. Coverage and controls should prevent and mitigate harm. The new HVNL should encourage safe practices and not limit them. It should prohibit unsafe practices.”

**Question 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?**

34. NatRoad submits that additional rest breaks for higher risk work is a possible solution to the increased risk of fatigue related incidents during certain times e.g. when driving at night. To work, this solution would need greater investment by governments in properly structured rest areas that have a full range of amenities. NatRoad believes that government must mandate rest area construction along new or remediated road structures so that there are adequate rest areas throughout Australia’s road network. Rest area construction should be a mandatory component of the construction of new roads and where roads are upgraded.
35. NatRoad members have indicated to us that shuttle and change over work is becoming more prevalent in the industry. It avoids, for example, higher risk shifts like backward rotation of shifts (moving from night back to afternoon or day shifts). But this practice suffers from lack of adequate rest areas.
36. Customers are requesting preference to this work for wellbeing reasons. They perceive that the driver is having better life quality where the driver can return home each day to rest. The driver returning home to rest also leaves the vehicle vacant during the day. Thus, trucks can then be used on local work during the day, effectively double-shifting the truck.
37. By way of specific example, the shuttle and change-over work conducted between Sydney and Brisbane along the A1/M1 (Coast Road) suffers from a debilitating lack of appropriate rest areas. The drivers are required to find a safe location to drop trailers or swap vehicles around the halfway point. Clybucca and Kempsey and other towns along the route all suffer from a lack of safe locations for drivers to undertake this task. A lack of adequate rest and parking areas leads drivers to take undue risks when parking is not available given the current limited supply. Increased construction of rest areas would also therefore increase the utilisation of work that avoids some of the higher risk shifts identified in the Issues Paper.

**Question 4: How should a new HVNL address driver health and lifestyle factors? What kind of controls could be effective?**

38. This submission has already indicated that regular health assessments should be part of the restructured HVNL: paragraphs 21 and 22 above.
39. Drug and alcohol testing is expensive and there is often resistance to implementation of such testing, including through litigation.<sup>23</sup> But NatRoad believes that any accreditation/

code of practice established under a restructured HVNL should preference those operators that have a system in place for testing for drugs and alcohol. This step should be supported by publicly funded education campaigns that inform all drivers of the risks of substance dependence and abuse.

40. In addition, there should be a recognition that drivers are able to self-assess as being too tired to commence or continue work without workplace repercussions. That policy should be incorporated into the relevant code of practice. This policy is one important example of the need to encourage a safety culture.
41. NatRoad supports Draft principle 3 as follows (with one change suggested mentioned separately): “The new HVNL should nurture a safety culture among heavy vehicle operators, with a view to continuous improvement. It should encourage operators to develop and apply their technology, practices and systems, and to share what they learn. It should support the use of fatigue management systems with fatigue monitoring technology, especially if they are more effective than prescriptive hours.”
42. We believe that the phrase “especially if they are more effective than prescriptive hours” be deleted. NatRoad is committed to assisting the roll out of effective fatigue monitoring devices. They are sure to be better than setting prescriptive hours.
43. NatRoad is therefore supportive of work underway at present using different fatigue metrics and other body responses to refine current fatigue monitoring systems to accurately predict and provide a warning to the driver well before the onset of behaviour that could lead to an incident. Success with development of technology of this kind would give drivers and operators the ability to respond before any sign of fatigue sets in.
44. Funded under the Cooperative Research Centre Projects funding scheme, the Advanced Safe Truck Concept (ASTC) project<sup>24</sup> brings together technology, research and operational expertise to develop an innovative driver state sensing concept for use in commercial vehicles. This research is conducted through the Australian Government Funded Cooperative Research Centre Programme.
45. At present data is being collected by the Monash University Accident Research Centre from drivers who experience mild to extreme impairment, and who can be observed in real world operational environments. This is a significant research effort to develop enhanced technology to measure and predict driver states in real-time, using Seeing Machines’ driver monitoring technology as the core sensing means.
46. Ten trucks have been fitted with a new sensing platform and data was collected over 6 months. This is estimated to generate over 30,000 hours of real-world data that is critical for technology development.
47. The aim is to link driver monitoring systems to events happening outside of the cab (forward-facing) and link this monitoring to other technologies available in heavy vehicles. A further aspect is the ultimate aim of all heavy vehicles having in situ technology that records location so that it detects road conditions and important safety variables such as speed limits, lane widths, forward merging points, as well as inputs on congestion and incidents. In some ways, these technologies all exist now, but are not linked.

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<sup>24</sup> <https://www.monash.edu/muarc/research/research-areas/transport-safety/astc>

48. We believe that the results about how to enhance the current monitoring technology and how best to alert the operator will be available this year. NatRoad is not seeking that this technology be mandated. But this example shows that operators should have the choice to adopt any technology that is outcomes focused and which assists them in monitoring fatigue.

49. The prior discussion leads into the next topic raised in the Issues Paper.

**Question 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?**

50. As indicated in the Issues Paper, fatigue monitoring and detection is a game-changer. The results of the study just discussed are a good starting point for ensuring that regulator drafted codes of practice contain the basis for how to meet higher level performance requirements through, in particular, technological solutions. Adopting the three tiered structure in the new HVNL, as discussed in the First Submission, will lead to greater agility in the law.

**Question 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?**

51. The accommodation of new and emerging technologies comes from regulating them without preferencing a particular form of technology or mandating forms of technology, as with the failed IAP system. As indicated in the Issues Paper “operators are in the best position to identify and manage the specific risks they face.”<sup>25</sup>

52. As is evident from the answers to questions 4 and 5, we submit that we are on the cusp of fatigue monitoring technology supplanting the use of work and rest hour requirements. But the setting of “outer limit” rules should still be part of the law, using the WA system to establish those limits. This mixture is capable of accommodating all transport tasks.

53. Accordingly, NatRoad supports Draft Principle 4 as follows: “The new HVNL should accommodate the range of risk profiles and operating needs associated with different transport and freight tasks. Fatigue management requirements should be able to be applied in a way that matches the transport task.”

**Question 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?**

54. The needs of all Australian States and territories are, surely, the same. That is to have fatigue management rules that advance safety and the efficiency of the industry. We believe the rules that apply in WA achieve these aims. We believe that the WA rules are much simpler than current HVNL rules, especially relating to record keeping, and are sufficiently flexible to accommodate the range of transport tasks.

55. The differences between the WA system and the frustrations felt by NatRoad’s WA members in the context of application of the current law categorically arise when considering the cross-border rules of the HVNL.

56. The HVNL in s245(2) says:

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<sup>25</sup> Above note 1 at page 47

*If, within the last 7 days, the driver has spent any work time in a participating jurisdiction, any time spent by the driver in the non-participating jurisdiction must be treated in the same way as it would have been treated if the time had been spent in a participating jurisdiction.*

57. This essentially means that work activities outside of participating jurisdictions are counted when the driver works in a participating jurisdiction. Because of the differences between the WA fatigue laws and the fatigue management rules in the HVNL compliance with s245 means that adopting the more restrictive HVNL limits is required. This includes the keeping of a national work diary with all its pedantic requirements.
58. The application of s245 can be problematic as, in our understanding, if a driver who is operating under BFM or Standard hours must work within the HVNL rules, they would be unable to reach Perth from the SA/WA border in one shift as NatRoad believes that requires a 15.5 hr work shift that is only available under the AFM regime or the WA Fatigue Management regime. That is patently absurd. In practice it would mean the driver being forced to take a second additional sleep rest on the return leg of the journey when a better rest could be obtained by returning to home base. If the driver is not fatigued surely this is a better outcome?
59. We support Draft principle 5 as follows: “Fatigue management requirements in the new HVNL should be easy for operators to understand and meet. There should be flexible compliance options that let operators comply in a way that best meets their needs.”

**Question 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?**

60. As has been made plain throughout this submission, prescriptive administrative rules that do not properly address the risks of driving whilst fatigued must be removed from the HVNL. Attachment A shows why that is so.
61. Any system of greater flexibility should be established in a code of practice. Plainly stated high level duties should be expressed in the statute. Assurance activities to meet these duties should be encouraged.

**Question 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?**

**Question 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?**

62. Section 4.5 of the Issues Paper mentions performance based regulation and safety assurance. NatRoad supports both options for compliance with fatigue management laws.
63. As we indicated in the First Submission, the three-tiered approach adopted in the harmonised WHS laws accommodates the issue of those who want to provide unique compliance solutions or those who want to follow a prescriptive code of practice. Which path to follow should be an individual choice.
64. The HVNL should give the opportunity for operators to take full responsibility for compliance once demonstrated minima are in place: e.g. records, a fitness for work program,

appropriate technology and/or control of hours via shuttle or change over patterns of work or outlier limits that do not exceed the maximums.

65. The issue of roadside enforcement should be focused on drug and alcohol testing and evidence that minimum requirements are met. A safety assurance/accreditation certificate could be issued which would entitle the operator to obtain a "wave-through" at checking stations such as the one currently operated at Marulan, NSW.
66. We support draft principle 6 with an addition proposed after the articulation of the principle: "Enforcement under the new HVNL should target the most significant threats and consequences associated with driving fatigued. Enforcement efforts and sanctions should align with these threats and consequences. They should also be proportional to the severity of the risk." We suggest the addition of another sentence: "A first warning system for record keeping should be implemented with failure to improve within a time limit set as the point at which any sanction for administrative breaches is imposed."

**Question 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? Question 12: What else would you like to tell us about effective fatigue management?**

67. The best value is obtained from compliance where research and education are given priority. Therefore, if a compliance officer believes that fatigue records are inadequate, a warning should be issued before sanctions are applied unless fraud is detected.
68. Operators need the elimination of petty administrative offences and the establishment of a performance based system that is technology driven.

### **Conclusion**

69. The current system is dysfunctional, as shown by the case study in Attachment A.
70. We refer to paragraph 32 of the First Submission and ask that anomalies relating to two up driving described there be addressed in a reformed HVNL.
71. Reform based on the WA system underpinning a performance based system should be introduced.

## Attachment A

### Case Study: Work Diaries are Poor Tools and Enforcement is unjust

The following notes are from a member's referral to NatRoad.

In December 2018 a driver in the members' two up driver team received a Court attendance notice from RMS NSW alleging that he had operated two Work Diaries concurrently in June 2018, nominating the Diary ID number sequences as XXXX and XXXX.<sup>26</sup>

The allegation is a breach of s326(1) which is as follows: "The driver of a fatigue-regulated heavy vehicle must not have in the driver's possession more than 1 written work diary in which information can be recorded on a daily sheet." It carries a maximum fine of \$10,000, CPI adjusted to \$11,210.00<sup>27</sup>

Our Driver maintains he has not operated two Diaries concurrently and has produced the Diary and subsequent Diary to support his argument. Our Log Checker process has not identified multiple concurrent diaries being used. This offence was detected by Safe-T Cam at Broken Hill, there was no on road intercept. We were therefore puzzled how a 'possess more than one diary' offence could be detected.

The driver charged worked as part of a two up team between Sydney and Perth. Members of the team were often the subject of a trigger for an alleged fatigue breach when they traveled through the NSW camera network. The operator reported that the company was therefore required to produce diary pages to RMS to demonstrate compliance at a considerable dead weight cost. Such a request was received for this trip, and documents confirming fatigue compliance were submitted by the operator.

The operator believes that in the process of reviewing those pages RMS concluded that pages from two successive work diaries were submitted. The operator examined the pages submitted and found them to be part of a series XXXXXXX ending with XXXXX00 and that a change of diary occurred starting with a new number sequence XXXXX01. There are no pages in the sequence other than the last page in the old book. Given that you can only obtain one national work diary at a time and must sign a statutory declaration to confirm that the previous diary has been used or lost before a new one is issued it is difficult for a driver to obtain two successively numbered work diaries in any event. Having regard to this issue and the operator's review of the work diary pages, the operator concluded that the issue of the court attendance notice did not make much sense.

Although the work diary is a 'national' diary which carries NHVR branding, the diaries are actually produced and sold by the individual States that issue them. WA and SA issued Diaries have number sequences starting ZZZ888801 to ZZZ888900. NSW and QLD Diaries have number sequences ZZZ888800 to ZZZ888899. Look carefully, the distinction is subtle but significant. It appears RMS NSW are not aware that WA issued Diaries have """"00 as the last page of a book and have assumed the page break is the same as NSW where """"00 indicates the start of a new book. They have

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<sup>26</sup> Details held but made anonymous here

<sup>27</sup> <https://www.nhvr.gov.au/files/201906-1054-hvnl-penalties-and-infringements-2019-20.pdf>

therefore concluded that the driver has used the first page of a new 'rogue' book when he has used the last page of his current book.

The operator consulted NatRoad and we concluded that no offence has been committed. NatRoad does not usually act for drivers but given the circumstances we offered to, on signature of the required authority to act, make representations on behalf of the driver.

The operator and the driver were faced with the task of defending the allegation. Because the offence was nominally detected at Broken Hill the nominated court is Broken Hill. The driver is based in Perth and the operator's nearest depot is Sydney. In order to attend court to plead 'not guilty' (which would likely only cause a deferment of the hearing to another date) the driver would have to travel from either Perth or Sydney to Broken Hill. Either option would cost him a significant amount; say a week's pay and airfares, probably around \$5000. If the operator determined to stop an express truck in Broken Hill for 24 hours to allow him to attend (assuming we could re-schedule a service to be there on the correct day) the operator would effectively lose a week's revenue from that Road Train because it would be off path and out of sync with customer service expectations; say \$30,000. NatRoad was not able to represent the drivers in court given the distance involved and the costs, and the fact that the drivers concerned resigned from the operator's employ **because of this issue**.

In the result the operator has lost both drivers who now only work in WA. They have resigned and the matter still appears to be before the courts. It cannot be emphasized enough that this incident triggered their resignation given that they could not understand the offence in the first place and the cost of either fine but especially its defence is entirely prohibitive.

The operator commented to NatRoad: "One of the great difficulties is recruiting new drivers to the industry and a key factor is a broadly held view that there is a persistent risk of harassment and abuse from enforcement agencies which includes the issue of unwarranted and unjustified fines for trivial or perceived offenses."

This case study also reinforces three main NatRoad policies for change: first, the camera system should not add dead weight administrative costs to operators where they operate BFM, AFM or utilize two-up drivers. The Notices to Produce that are generated are costly to respond to and to administer.

Secondly, work diary infringements focus on administrivia rather than on controlling the risk of driving whilst fatigued. A better system must be introduced.

Thirdly, that the manner of enforcement of the HVNL provides little or no real life justice. There must be in place a fair and cost effective avenue to independent review that avoids the current strictures imposed by the functioning of courts.