

Submission No. 002

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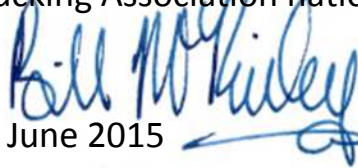
24 June 2015

**Submission to:** Infrastructure, Planning and Natural Resources  
Committee

**Title:** Heavy Vehicle National Law Amendment Bill  
2015

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## 1. About the Australian Trucking Association

The Australian Trucking Association (ATA) is the peak body that represents the trucking industry. Its members include state and sector based trucking associations, some of the nation's largest transport companies and businesses with leading expertise in truck technology.

## 2. Summary of recommendations

### Recommendation 1

The Committee should recommend that the Deputy Premier and Minister for Transport not agree to any change to the NHVAS standards and business rules that would require the installation of EWDs as a condition of accreditation.

### Recommendation 2

The committee should recommend that paragraph 27(2)(m) of the *Heavy Vehicle (Fatigue Management) National Regulation* be amended to make it clear that the system specified in the example does not have to be an electronic work diary system as defined in the HVNL.

### Recommendation 3

The Committee should recommend that the Deputy Premier and Minister for Transport should press for the NTC work program and the NHVR corporate plan to include the proposed review of the treatment of small breaches to ensure that it resourced and scheduled effectively. The review should specifically examine:

- the take up rate for electronic work diaries
- the appropriateness of the eight minute tolerance for work periods, given the take up rate and
- if there should be a tolerance applied to the length of rest periods.

### 3. Introduction

The Heavy Vehicle National Law Amendment Bill 2015 would:

- replace the placeholder provisions in the Heavy Vehicle National Law (HVNL) for electronic work diaries (EWDs) with new provisions that would enable the National Heavy Vehicle Regulator (NHVR) to start approving these systems for voluntary adoption by trucking businesses
- amend the penalty provisions in the law to make them more consistent and equitable
- implement a series of minor and technical amendments identified through the National Transport Commission's HVNL maintenance program.

This submission deals with the amendments relating to electronic work diaries.

### 4. About electronic work diaries

At present, the HVNL requires drivers of fatigue regulated heavy vehicles to fill out written work diaries (WWDs) to record their work and rest hours. Drivers are required to work in accordance with one of three work and rest hours options:

- standard hours: the default option for drivers operating fatigue regulated heavy vehicles
- BFM (basic fatigue management), which offers increased working hours for drivers working for specially accredited businesses. Drivers must undertake regular medicals; both drivers and schedulers must have special fatigue training
- AFM (advanced fatigue management), which provides flexible working hours for operators with sophisticated fatigue management systems.

Drivers working under standard hours and doing local work do not need to fill in a written work diary, but must still comply with the legislated work and rest hours. The drivers' record keepers must nonetheless record their work and rest times, rosters and trip schedules.<sup>1</sup>

Many trucking businesses use computerised or even slide-rule like systems to complement their drivers' written work diaries. These include:

- In-cab systems that drivers use to record their work and rest periods, in addition to entering the information into their WWDs. The systems then analyse those records for compliance.
- Back-office systems (which could be as simple as an Excel or Open Office spreadsheet) that require supervisors to key in the information from the employer copy of their drivers' work diary pages. Again, the systems analyse the information for potential breaches.
- Rulers and circular slide wheels that make it easier for drivers to calculate their work and rest times.

It should be stressed that these systems supplement, but do not replace, drivers' written work diaries.

In contrast, the electronic work diaries that would be approved under this bill would replace the need for drivers to fill in written work diaries. As a result, electronic work diaries offer the prospect of a considerable reduction in the red tape burden faced by operators and drivers, as well as a potential improvement in fatigue compliance for some operators.

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<sup>1</sup> HVNL, s319.

The operational pilot of electronic work diaries found that a 9 per cent takeup of EWDs could deliver more than \$200 million in savings in net present value terms to operators, EWD system managers and authorities over five years.<sup>2</sup>

The pilot was unable to assess the safety benefits of rolling out EWDs. The ATA would simply note that the safety benefits can only be delivered if there are enough heavy vehicle rest areas for drivers to stop and take their required breaks. Significant investments have been made, but more work still needs to be done.

The EWD provisions in the bill raise two issues for the ATA.

The ATA considers that installing EWDs should be voluntary (except when ordered by a court), but the bill does not address two situations where they could effectively become mandatory.

In addition, the tolerance levels in the bill for what are known as small breaches are inadequate. As a result, the ATA anticipates that many operators and drivers will choose to continue using written work diaries, despite the potential red tape reduction benefits of switching to EWDs.

## 5. EWDs need to be voluntary

Under the bill, the use of electronic work diaries would be voluntary. Operators and drivers could continue to use their WWD based systems.

The ATA strongly supports this voluntary approach. Although EWDs could offer great advantages for some businesses, installing them would be an unnecessary cost for many others, such as businesses that:

- operate a small number of trucks. This is reflected in the cost benefit analysis in the operational pilot report. The 1 per cent and 9 per cent take up models in the analysis are based on the premise that no businesses with 1-4 vehicles — none at all — would take up EWDs.<sup>3</sup>
- largely or exclusively undertake local work under standard hours
- operate their vehicles occasionally, including primary producers that only use their vehicles at harvest time
- already have commercial fatigue management systems.

In the ATA's view, the only situation where EWDs should be mandatory is where a court orders an operator to install them after convicting the operator of an offence.

The HVNL gives courts the option of imposing supervisory intervention orders on convicted operators instead of, or in addition to, financial penalties. A court could, for example, direct an operator to appoint a new compliance manager, provide additional training to staff, or install equipment — such as EWDs — for monitoring or managing compliance with the law.<sup>4</sup>

## EWD use under the National Heavy Vehicle Accreditation Scheme

The National Heavy Vehicle Accreditation Scheme (NHVAS) is an alternative compliance scheme run by the NHVR.<sup>5</sup> Operators in NHVAS must have internal procedures that meet the NHVAS standards, and are audited periodically by NHVR-registered auditors.

<sup>2</sup> Transport Certification Australia, *Operational pilot of electronic work diaries and speed monitoring systems: final report*, TCA, Melbourne, 2013. Report prepared for NSW Roads and Maritime Services. p97. Available at [http://roadsafety.transport.nsw.gov.au/stayingsafe/drivers/heavyvehicledrivers/electronic\\_work\\_diaries\\_oct2013.pdf](http://roadsafety.transport.nsw.gov.au/stayingsafe/drivers/heavyvehicledrivers/electronic_work_diaries_oct2013.pdf)

<sup>3</sup> TCA, p96.

<sup>4</sup> HVNL, s600.

<sup>5</sup> It should be noted that the ATA runs the industry's accreditation program, TruckSafe.

Operators accredited under NHVAS receive regulatory benefits. Most relevantly, accreditation under the NHVAS BFM and AFM modules is a pre-condition to accessing the additional working hours available under those work and rest hours options.

The operational pilot noted that an unresolved policy question was whether installing EWDs should be required as part of NHVAS accreditation.<sup>6</sup> It would no doubt be argued that this would not offend the principle that EWDs should be voluntary, because operators could always choose not to become NHVAS accredited.

In reality, NHVAS accreditation is essential in many parts of the industry because operators cannot compete effectively without the extra working hours it offers. These operators would be compelled to install EWDs to maintain their accreditation, even if it did not offer them any benefits.

The NHVAS standards and business rules must be approved by the responsible ministers of all the HVNL jurisdictions, as well by the relevant Commonwealth minister.<sup>7</sup> Accordingly, the ATA recommends:

### **Recommendation 1**

The Committee should recommend that the Deputy Premier and Minister for Transport not agree to any change to the NHVAS standards and business rules that would require the installation of EWDs as a condition of accreditation.

### **Could EWDs be required as part of taking all reasonable steps?**

The duties in the HVNL require chain parties to take all reasonable steps to prevent a contravention of the law, such as a fatigue breach. Under some provisions of the law, a person may have access to the reasonable steps defence, which can require the person charged to prove they took all reasonable steps to prevent a contravention from occurring.<sup>8</sup>

The HVNL does not anywhere define the meaning of all reasonable steps, and experience has shown that the term has serious practical problems:

- the ordinary meaning of the word ‘all’ suggests there is a list of reasonable steps somewhere that must all be implemented, even if some of those steps cover the same ground or are redundant given the steps already taken by the business.
- the term does not include any reference to the practicability of implementing those steps, although s622(h) lists ‘the degree of ability’ of a person to implement measures as a matter a court can consider in relation to fatigue or speed management offences.

Based on this experience, the ATA is concerned that an aggressive enforcement agency could argue, in a chain of responsibility case, that a trucking business should have installed EWDs, despite having systems to monitor its drivers’ written work diaries, on the grounds that installing an EWD could be seen as a reasonable step when considered in isolation from the other steps taken by the business.

This would be absurd, given that a business with an effective WWD system can achieve what the operational pilot described as sound compliance rates.<sup>9</sup>

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<sup>6</sup> TCA, p118.

<sup>7</sup> HVNL, s654.

<sup>8</sup> s618. Alternatively, the person could seek to prove there were no steps they could reasonably be expected to have taken to prevent the contravention.

<sup>9</sup> TCA, p45.

In its submission to the NTC chain of responsibility duties review, the ATA recommended that the concept of ‘all reasonable steps’ should be retired and replaced with the work health and safety standard, ‘so far as is reasonably practicable.’

In the meantime, the ATA considers it would be appropriate to amend the *Heavy Vehicle (Fatigue Management) National Regulation* to clarify that ‘systems for monitoring and remedying problems relating to fatigue and compliance’ do not necessarily need to be EWDs.

**Recommendation 2**

The committee should recommend that paragraph 27(2)(m) of the *Heavy Vehicle (Fatigue Management) National Regulation* be amended to make it clear that the system specified in the example does not have to be an electronic work diary system as defined in the HVNL.

**6. There are issues with how small breaches are treated**

The most contentious issue in the development of the EWD amendments was the treatment of small breaches of the fatigue rules.

Drivers using written work diaries are directed to round their work and rest times to 15 minute blocks. Work time should be rounded up; rest time should be rounded down.<sup>10</sup> As example 1 shows, small breaches of the working time rules tend to disappear in the rounding process. They also balance out over time.

**Example 1: A 6.00am start**

Michael is a long distance driver who drives a fatigue regulated heavy vehicle under standard hours. As a result, he must take a short (15 minute) rest break after no more than 5¼ hours of work.

Before he leaves his home base, he agrees on a safe driving plan with his scheduler. The plan envisages that he will take his short break at a rest area that experience shows can be reached in 5 hours.

Michael starts work at 5.58am, but is delayed on the road by traffic congestion. He arrives at the rest stop at 11.15 am, 5 hours and 17 minutes after he started work.

Technically, Michael has worked longer than allowed by law. He should have recorded his start time as 5.45am, but as could be expected he rounds it to the nearest quarter hour on his work diary page, 6.00am. He records his work and rest time as follows:

Michael’s work diary entry complies with the HVNL; the breach effectively disappears into the rounding.

<sup>10</sup> HVNL, s246.

In contrast to written work diaries, EWDs are precise – under the terms of the bill, they would record time at one minute intervals.<sup>11</sup> In example 1 above, the EWD would record a minor risk breach, which carries a maximum penalty of \$4,100.

In its final policy paper on EWDs, the NTC recognised that it was important to treat WWD and EWD users equitably. It said:

...it is unlikely that the rounding rules are universally applied correctly, and a driver can presently conceal a small breach through a reverse application of the rounding rules – that is, round down a few minutes of worktime, and not up to the next 15-minute increment. These small breaches are very difficult to identify in the current system and for these drivers the EWD creates a disadvantage. The question is to what extent these real-life practices should be taken into consideration when seeking to ensure equity between EWD and WWD drivers. If the fatigue risk is low, and the safety benefits of EWDs high, then it is arguable that, in the context of voluntary uptake, policymakers should take into consideration current practices.<sup>12</sup>

The commission sought advice from fatigue experts, who generally concluded that the safety risk of breaches of less than eight minutes was likely to be negligible, as long as the breaches did not accumulate over multiple work periods.<sup>13</sup>

Accordingly, the NTC found that the HVNL and *Heavy Vehicle (Fatigue Management) National Regulation* should be amended to provide that EWD drivers operating under standard hours or BFM could exceed a work period, under any applicable work rule in the 24-hour period, by up to and including eight minutes in any one incident or in total over the 24-hour period. The NTC limited this to breaches of the work limits and specifically excluded small breaches of the rest limits from the tolerance.

It concluded that the treatment of small breaches should be reviewed for its impact on fatigue risk and compliance and enforcement operational effectiveness after two years of initial uptake by industry.<sup>14</sup>

The ATA has three concerns about the NTC's approach to small breaches, as implemented in the bill:

- in our view, and as demonstrated by data from the various systems used in the operational pilot, the eight minute tolerance would still result in EWD users recording a higher number of minor risk breaches than WWD users.
- the approach would apply zero tolerance to small breaches of the rest period requirements, on the grounds that drivers have, in theory, more control over the timing of the end of their rest periods than over their work hours.<sup>15</sup> Example 2, however, shows that a tolerance should be applied to reflect the real world of how drivers take rest breaks.
- the NTC's 2015-2019 work program does not implement its own recommendation that there should be a review of the treatment of small breaches after two years. Nor is the review included in the NHVR's 2015-16 to 2017-18 corporate plan.

<sup>11</sup> HVNL Amendment Bill 2015, clause 22, new s246A(2).

<sup>12</sup> National Transport Commission, *Electronic work diaries: final policy paper*. NTC, Melbourne, 2014, p24. Available at <http://ntc.gov.au/heavy-vehicles/technology/electronic-work-diaries/>

<sup>13</sup> NTC, pp26-28.

<sup>14</sup> NTC, p33.

<sup>15</sup> NTC, p25.



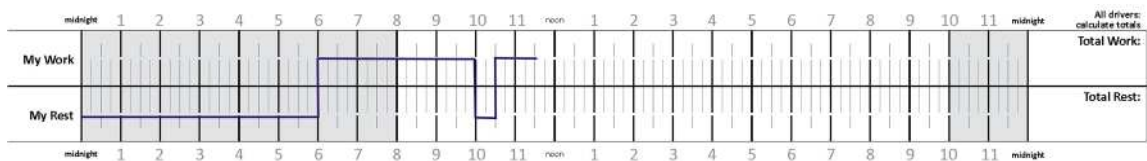
**Example 2: Taking a rest**

Suzanne drives a fatigue regulated heavy vehicle under BFM hours. She must take a rest break of at least 15 minutes after no more than 6 hours of work, and at least 30 minutes of rest (in blocks of at least 15 continuous minutes) after no more than 8½ hours of work.

Suzanne starts work at 6.00am, but after four hours of work, at 10.00am, feels tired. She decides to take a 30 minute rest break straight away.

Suzanne pulls into a rest area, naps for 20 minutes and has a cup of coffee from her thermos. She glances at her watch. About half an hour has passed, so she pulls back out onto the road. She does not realise that her break was, in fact, 29 minutes.

In a written work diary, Suzanne would record her break as 30 minutes:



If Suzanne was using an EWD, however, the device would record only 29 minutes of rest. Suzanne would need to take an additional 15 minute rest break before 3.00pm, even if she did not feel tired, or she would commit a minor risk fatigue breach with a maximum penalty of \$4,100.

The reality recognised by experienced police and the industry is that small breaches of the fatigue laws like the ones in examples 1 and 2 do not have serious fatigue or safety consequences. The focus of enforcement needs to be on significant fatigue breaches, businesses that do not have fatigue management systems and off-road parties that ignore or skirt their obligations under the law.

The approach to work and rest limit tolerances in the bill would effectively create a two-tiered system, where operators and drivers using EWDs would face a significantly tighter regulatory regime than those using written work diaries. The ATA expects that many operators and drivers would, as a result, decide to continue using written work diaries, despite the potential red tape reduction benefits of EWDs.

Ideally, the bill and the *Heavy Vehicle (Fatigue Management) National Regulation* should be amended immediately to address the industry’s concerns. Alternatively, the recommended two-year review of the tolerances could be locked in to the NTC work program and NHVR corporate plans now.

**Recommendation 3**

The Committee should recommend that the Deputy Premier and Minister for Transport should press for the NTC work program and the NHVR corporate plan to include the proposed review of the treatment of small breaches to ensure that it resourced and scheduled effectively. The review should specifically examine:

- the take up rate for electronic work diaries
- the appropriateness of the eight minute tolerance for work periods, given the take up rate and
- if there should be a tolerance applied to the length of rest periods.