

# Reforms to Heavy Vehicle National Law (HVNL): Consultation Regulation Impact Statement (C-RIS)

## Submission from the TWU to National Transport Commission

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## ABOUT THE TWU

The Transport Workers’ Union of Australia (TWU) represents 70,000 workers in Australia’s aviation, oil, gas, waste management, road transport, passenger vehicles and freight logistics industries. With well over one hundred years’ experience, the TWU has been active in establishing industry standards that improve the lives and safety of transport workers, their families and the wider community.

This work has included a long history of establishing innovative regulatory systems which have, among many things, helped to ensure that all road transport workers, including those in non-standard forms of work (such as owner-drivers) have access to fair, safe and sustainable working conditions.

The TWU also represents workers in the transport sector of the emerging ‘gig- economy’ which include on-demand rideshare, food delivery and parcel delivery workers. Since 2018, the TWU has led a campaign to ensure that transport workers in the gig-economy are provided access to safe, fair and ethical work standards.

## INTRODUCTION

The TWU welcomes the opportunity to make a submission to the C-RIS reforms on HVNL. The TWU recognises the need for HVNL reforms. However, we hold serious concerns about how far the proposals have developed without proper consultation and serious engagement with heavy vehicle drivers and their union. TWU’s engagement has been limited to two briefing sessions – one after Mr Ken Kanofski had written his draft report and the second, a briefing on the C-RIS with the NTC. This has made it impossible to reframe the direction of these reforms.

With regards to the C-RIS, this submission will focus on the fatigue proposals with some general comments on access. The TWU remains concerned that the HVNL reform proposals still has a punitive focus on heavy vehicle drivers with no proper measures to deal with the prevention of

fatigue or the effective management and enforcement of chain of responsibility (COR) for those further up the chain. Notwithstanding, the TWU is supportive of some proposed changes to enforcement and penalties that allow for flexibility and recognition of issues like minor administrative errors. The TWU recommends that the NTC and the government take a whole of government and whole of industry approach to dealing with fatigue management, access and accreditation before drafting and implementing changes. This includes the considering how the *Closing the Loopholes Bill* which contains a transport division intersects with HVNL and the proposed reforms.

## FATIGUE MANAGEMENT

***Consultation Question 1: To what extent has the C-RIS fully and accurately described the problem to be addressed within the scope of identified issues? What other factors should be considered in the problem statement? Please provide detailed reasoning for your answer***

***Consultation Question 3: In addition to the barriers and constraints identified, what other impediments could impact on the success of implementing options presented in the C-RIS***

***Consultation Question 13: Taken as a package, would these reforms to fatigue management create a fairer regulatory approach overall?***

There is an ongoing safety crisis in the road transport industry that is primarily caused by economic pressures that erode safe and sustainable industry standards and render bodies like the NHVR ineffective. The pressures arising from unsustainably low rates or untenable contracting requirements set in transport supply chains, force transport companies and workers to cut corners, take risks and reduce safety standards to remain commercially viable. Underpinning this dynamic is the power imbalance between industry participants. Transport operators and drivers in the industry are price takers, with low barriers to entry, high-numbers of sole-proprietors, low margins, and competition for work lead to an “acceptance of non-viable rates, excessive and illegal working hours and stressed and chronically fatigued drivers”.<sup>1</sup>

The relationship between these economic pressures and safety outcomes in the road transport industry has been proven by an overwhelming body of evidence, collected over decades, involving hundreds of experts, academic studies, coronial inquests and Government inquiries. This research has for example, demonstrated a clear correlation between rates of pay, payment structures and the prevalence of risk-taking practices including fatigued driving.

Effective fatigue management for heavy vehicle drivers is a complex matter that requires a multi-pronged approach to preventing, managing, and enforcing fatigue management. The fundamental problem and frustration for our members is over the lack of control they have in preventing and managing their fatigue, including hours and rest periods, the targeting by police and the NHVR which rarely escalates to other CoR participants and crucially the ability to alleviate the pressure to continue to drive that comes from those up the chain. The NTC in fact commissioned the seminal *Safe Payments: Addressing the underlying causes of unsafe practices in the road transport industry* report in 2008 that included an examination of the root causes of fatigue related crashes and

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<sup>1</sup> Mayhew, Claire and Quinlan, Michael, (2006), *Economic pressure, multi-tiered subcontracting and occupational health and safety in Australian long-haul trucking*, Employee Relations, Vol. 28 No. 3, pg. 225.

recommended a safe payments system – yet the industry still does not have one, but there is a set of NVHL and the NHVR that is supposed to regulate fatigue.

The TWU’s recent submission to the Senate Standing Committees on Education and Employment on the *Closing the Loopholes Bill* outlines the requirement for fatigue to be managed alongside remuneration and other dynamics in the industry. It also provides important context on why the TWU at this stage, is unable to state which of the option(s) set out in the C-RIS we support. The submission is attached separately as Appendix A and forms part of this submission. It includes a list of 138 sources supporting the link between safety outcomes and the economics of the transport industry in Australia. If the NTC does not take this as the starting point for drafting legislation, it will be a missed opportunity with deadly consequences. It is even more concerning that there appears to be little change to strengthen and enforce Chain of Responsibility (CoR) under HVNL.

While it may be easier to offer options to tweak out-dated rules, fatigue and the consequences for driver health and safety is more than just about following the rules. HVNL has created a culture where the industry now works to the maximum number of allowable hours, for example, 12 or 14 hours with BFM with a seven-hour rest break because it is legal not because it is necessarily safe to do so.

This has flowed into the industrial relations system as the baseline for rest periods. The TWU has heard from numerous long-distance drivers who raise the very practical issue that a 7-hour break is not long enough to travel home, eat, decompress from work, spend time with the family and at best 5 hours of sleep then must allow for travel time to work for their next shift. No other industry expects workers to operate on 5 hours or less sleep. Further, the onus is then on drivers to say no and request breaks. As one of our NSW linehaul drivers said:

*The attitude is that as long as you get a 7-hour rest break they will make you drive the maximum hours you can and push to get your BFM or AFM so they can work you harder. Is it legal? Yes. Is it safe? No. Because now neither my roster or my work diary allows me to sleep when I am actually tired or for longer than 5 hours. I’m on a cycle that works for the business and their customer. I work 12-14 hours a day with 7 hours so called rest and then do it all over again. It’s risky and not sustainable. But the law says I can.*

Simply stipulating that it is the driver’s duty to not drive while fatigued and that operators or customers cannot force drivers to work while fatigued has not worked. This is because the HVNL does not have provisions to prevent this situation from happening in the first place, enforcement is overwhelmingly at the driver end and no measures in place to give drivers the ability to do so without the consequence of losing their job, pay or the operator losing a contract.

The vast majority of operators and customers have hundreds of pages of policies and documents demonstrating how they comply with HVNL and WHS laws yet heavy-vehicle related crashes have remained unacceptably high, the transport and logistics industry remains one of Australia’s deadliest industries and driving is the most dangerous occupation according to Safe Work Australia.<sup>2</sup> On the driver’s side, working long hours under pressure is how they are able to earn a living wage. This is why fatigue management must include regulations on rates and safe payments. The TWU recommends that the appropriate body to manage these intersecting issues should be the one that will be established under the *Closing the Loopholes Bill* currently before Parliament.

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<sup>2</sup> Safe Work Australia, (2023), *Key Work Health and Safety Statistics, Australia 2022*.

The TWU has been fighting for a body that can look at the interrelated issues and cross departmental issues to set higher standards in the industry. In our 120 years of experience representing transport workers', we know that where drivers have a strong collective voice with delegate and HSR structures they are better equipped to manage with their employers, contractors and customers a range of safety issues including fatigue. However, the current heavy vehicle and industrial relation regulatory regime is encouraging a race to the bottom. The NHVR and NTC must at a minimum look at best practice in the industry to base reforms on.

***Consultation Question 2: Has the C-RIS provided sufficient evidence to support the case for government intervention? What else should be considered and why?***

The TWU acknowledges the complexity and challenges for the NTC to navigate proposals for HVNL. In principle the TWU supports government intervention in relation to the matters covered in the C-RIS. With regards to whether the evidence presented is sufficient, the TWU believes further research that includes a strong driver voice is required before regulations are changed. A whole of government approach must be adopted across departments that regulate all transport supply chain participants and drivers. For example, fatigue management has an impact on industrial relations – both the Award and bargaining system, working conditions, WHS, licensing, skills and training.

The evidence presented is too abstract for the TWU to support any of the options presented. There is a heavy emphasis on the 'regulatory burden' for business and a figure assigned to the value of a life, injuries etc. This may be necessary for economic modelling but it's a false rationale. If safety is the priority, it must include the prevention of near misses, injuries as well as crashes and fatalities. It must also factor in the ability to exercise rights as a key benefit. Keeping a work diary whether it be as a local or long-distance driver does not make a difference if you can't tell your boss or customer that the schedules are too punishing, or you need to pull over.

Profitability, efficiency and productivity while important should not come at a cost to safety. The evidence in the C-RIS should go beyond consultation and desktop research. It must examine the impact on drivers not just with regards to how much of a burden paperwork is but how keeping a work diary or following hours and rest rules can best help them manage their fatigue and safety on the road and how they will be protected if they feel fatigued.

### Expanding the scope of fatigue regulated heavy vehicles

***Consultation Question 4: Are there any potential changes to the impact analysis methodology that you would suggest? Please provide reasons and evidence.***

***Consultation Question 6: Do you support one or more options to change the scope of fatigue related vehicles? Please give reasons for your preference(s).***

***Consultation Question 8: Are there any additional impacts you think should be considered? If so, why?***

Fatigue management needs to be supported by a robust system of prevention and enforcement. The TWU accepts that there is a role in HVNL to manage hours of work and rest but that is not the only mechanism available to mitigate fatigue-related risks.

The evidence basis to expand the scope to all heavy vehicles over the 4.5 tonne or some variation of this is not clear in the C-RIS. While there may be some merit to expanding the scope, as in the TWU's

experience, fatigue is also an issue for local drivers, there are fundamental shortcomings in the existing legislation. The failure to recognise the link between safety, fatigue and rates means that the responsibility to manage fatigue practically speaking remains with the driver, rather than the customer and operator. The changes proposed still don't ensure that the responsibility sits with the party/parties that are best able to manage the risk.

Where TWU members have been able to work with proactive employers who want to do the right thing, fatigue management policies are developed in consultation with their workforce and within a culture where drivers have a voice without repercussions. For these reasons and as outlined in the previous section, the TWU recommends the NTC carries out in-depth qualitative and quantitative research with drivers and assess what can be replicated in law from best practice industry standards before proceeding further.

The current proposals mean that now all heavy vehicle drivers will feel the added pressure from their employer, contractor, customer and the regulator. The framework for HVNL and the role of the of the NHVR is still focused on the targeting of drivers for fatigue breaches, occasionally their companies and very rarely further up the chain.

***Consultation Question 5: Do you agree with the potential impacts of Options 1a and 1b as described above? Are there any additional impacts you think should be considered?***

For existing provisions that are already operating, the TWU does not have any strong objections to simplifying record keeping requirements and removing duplicate prescriptive work diary requirements.

Prescriptive work and rest requirements can work when it's made in consultation with drivers and may involve different options for different types of work. Many of our members are on BFM or AFM which was bought in to offer operators more flexibility, but it had the perverse incentive of working drivers harder and added pressure. This is why it fatigue management cannot be divorced from other working conditions. The issue isn't just about work and rest, it's linked to a driver's ability to make a living and to do it in a safe and sustainable way. The current regulatory regime does not accommodate this.

## Penalties and Enforcement

***Consultation Question 10: Do you support one or more options to change enforcement of fatigue related breaches? Please give reasons for your preference(s).***

***Consultation Question 11: Are there any implications of options to change enforcement of fatigue-related breaches you think should be considered? What issues would need to be considered as part of the implementation of these reforms?***

In principle, the TWU supports a risk-based approach to enforcement. However, enforcement can only happen if the regulatory levers are right and targeted. Simplifying record keeping and streamlining processes when a work diary is lost or stolen is acceptable in the confines of the current regime. The TWU also supports a process to review fines for 'trifling' offences and the use of formal education or warnings as these options are comparable to what is provided to other road users and license holders.

Regarding option 3b, the TWU understands the intent but have some concern about the complexity and whether it will add more confusion and misinformation. As we have not been involved in in-depth consultations it's hard to gauge the impact and whether these concerns could be resolved by a comprehensive review of the existing penalty regime.

The TWU also views enforcement and the HVNL regulatory regime as related to the education, training and the licensing of heavy vehicle drivers. These appear to operate independently of each other with little cooperation. The fact that it is beyond the scope of this review demonstrates the fundamental problem and challenges for the HVNL to achieve its objectives. The TWU supports a system that can set standards *and* work with different regulatory and training bodies with input by all industry stakeholders.

***Question 14: Regarding Option 3A, would a timeframe of 14 days or 28 days be more appropriate? Please provide reasons for your answer.***

The rationale to limit roadside infringement notices to 28 days has some merit to focus on the immediacy of the risk and there are other regulatory tools against CoR parties to address more systemic breaches. However, the TWU has no confidence that this will encourage the regulator or other CoR parties to audit and enforce them given it is so rarely used or successful. It will be useful to see NHVR data on the number of fines issued for breaches over 28 days, whether they resulted in systemic breaches and the outcome of audits and prosecutions.

## ACCESS

The TWU notes that increase to general mass, height and length limits may have productivity and efficiency benefits, but there are safety and industrial implications. The existing road network and infrastructure will struggle to support these changes and it would be unsafe and irresponsible to make these changes without considering upgrades, costs, implications for the government's Net Zero policy (both positive and negative) and the safety case for it. For transport workers, this must be preceded with adequate rest bays and facilities, skill recognition, adequate training and licensing arrangements. The C-RIS notes these issues but does outline the government's plans to resolve these issues. On the industrial side these changes could also impact driver classifications and pay as it is linked to the type of vehicle they drive.

## EXPANDING DRIVER DUTY

The TWU is alarmed that the NTC and Ministers have made this decision without talking to drivers or their union. It demonstrates the failure of the NTC to acknowledge the complexity of the issue. It is not simply a matter of it being aligned to WHS laws. WHS laws and regulations in relation to worker duties is supported by a whole system of protections, guidelines and clear PCBU duties alongside worker-led HSRs. Even with these protections many drivers are still afraid to exercise their rights and transport remains one of the worst performing industries with regards to safety.

To expect drivers or if pulled over - law enforcement to objectively assess their fitness to drive without proper guidance, training or medical knowledge is a recipe for disaster. Even if drivers could do so, like the issue of fatigue management it is not a matter of having the right to say no. The TWU has seen repeatedly that this is not an industry that can say no. To single drivers out, refuse to acknowledge the economics of the industry and offer no real changes to CoR will result this being



simply another way to shift the responsibility to drivers and for CoR parties to excuse their role in heavy vehicle and driver safety.

Further, changes to driver duty and fitness to drive must be made in the context of research on driver health – see for example the Driving Health study from Monash University referenced in TWU’s *Closing the Loopholes Bill Submission*. It is well established that heavy vehicle drivers particularly long-distance drivers are at a higher risk of a whole raft of health issues including heart disease, diabetes, sleep apnoea and poor mental health *because* of the nature of their work. Rather than punishing or expecting drivers to bear the consequences, the industry and those at the top of the supply chain must accept responsibility. The changes only deal with one of the symptoms and not the cause.

To clarify, the TWU strongly objects to this change until they consider the impact the structure of the industry has on driver health and safety, set appropriate regulations and duties to mitigate the pressures on drivers and have clear enforceable standards that are applied to all transport supply chain participants.

## CONCLUSION

The TWU acknowledges the magnitude of the task the NTC has had with this review and the work it has done on the reform proposals. HVNL is out-dated and in need of reform. The TWU cannot recommend strongly enough that the NTC and governments act on the evidence for safe payments, particularly in relation to fatigue management. Before further drafting is made, the TWU recommend that the NTC also consider obtaining genuine feedback directly from drivers and their union on how to improve HVNL. Alongside this it must work with other agencies and regulatory bodies. Until these steps are taken, tweaking the laws will not result in substantive enough changes to be able to meet the objectives of the law.

## APPENDIX A

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023: Road Transport Reform - Submission from the TWU to Senate Standing Committees on Education and Employment is attached separately to this submission.