

Submission to: National Transport Commission

Title: Preparing Australia for Electronic Work Diaries

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Index

1. Introduction.....	3
2. Recommendations.....	3
3. Policy evolution.....	4
4. EWD design.....	5
5. Industry views on EWD.....	7
6. Timeframe, Management and Cost.....	8
7. An Alternative Approach.....	10
8. Conclusion.....	15

1. Introduction

The National Transport Commission has released a regulatory issues paper entitled *Preparing Australia for Electronic Work Diaries* (EWD). This was published alongside the EWD/Speed Monitoring Operational Pilot report released by NSW Roads & Maritime (RMS), and the set of technical specifications published by Transport Certification Australia (TCA). This submission primarily responds to the call for industry feedback on the NTC's EWD paper but also refers to the associated reports.

The submission notes considerable evolution in the policy concept of a driver work diary. The NTC/RMS/TCA proposal also requires significant amendments to the heavy vehicle national law. A simpler, less invasive technology policy approach that places drivers and their operators/employers (not technology) at the centre of the compliance effort is discussed.

The Australian Trucking Association (ATA) believes it is premature to advance the EWD proposal as it stands to the National Heavy Vehicle Regulator (NHVR) for implementation until the policy is more clearly developed. The overall impression of the proposed EWD is that it is an elaborate and expensive over-reaction to a sound public policy desire to curb instances of driver fatigue in the interests of improving road safety.

2. Recommendations

The ATA does not endorse the model of an electronic work diary (EWD) as proposed. The outline of the EWD approach does not yet adequately justify its introduction. Nor is the concept at a stage that is workable for government or industry.

The ATA endorses the idea of a *voluntary electronic work diary for drivers to use that aids them with achieving compliance*, and also seeks:

Recommendation 1

That NTC lead development of an EWD that is capable of being used for both local work and 100 km plus work if the driver/operator wishes.

Recommendation 2

That NTC lead development of an EWD design that meets community expectations of monitoring devices, surveillance devices and privacy protection. Drivers using EWD must be informed about and trained in their use and treated fairly, with the ability to review data transferred, recorded or held.

Recommendation 3

That NTC lead development of fatigue management policy which applies to drivers, not trucks. An EWD must assist drivers and operators with monitoring compliance with work and rest rules, not truck operations.

Recommendation 4

That NTC lead development of an EWD that does not disadvantage drivers or operators commercially or operationally. This requires time counting issues to be resolved in a fair, reliable and robust way in law. Policy or enforcement guidelines are not sufficient. EWD users should find a commercial saving in their bottom line from adopting these devices, and drivers should report satisfaction in their use and greater comfort from a lower risk of accidental penalties.

Recommendation 5

That NTC lead development of an EWD that does not expose drivers or operators to more frequent diary review, create new or additional penalties or more onerous legal duties than those currently faced under the Written Work Diary. In other words, the industry seeks *equivalence*.

Recommendation 6

That NTC lead development of an EWD that supports driver compliance by providing guidance and alerts to warn of pending non-compliance for all time-related rules under Standard Driving Hours and Basic Fatigue Management. Similar support must be available to Advanced Fatigue Management drivers.

Recommendation 7

That NTC lead development of an EWD that is easy to use, can automatically transmit the necessary records of driver activity to the operator, alert the record holder of malfunctions, permit driver declarations and address the operational realities of multiple clients, different vehicles as well as the policy goal of assisting the driver and responsible chain parties to manage the driver's fatigue, not a truck's activities.

Recommendation 8

That NTC lead policy development of an EWD such that the operator is the primary record holder of EWD data and have the same record monitoring duties as those applied for Written Work Diaries.

Recommendation 9

That NTC lead development of an EWD policy under which enforcement activity occurs regularly and randomly at the roadside, and by audit like those for Written Work Diaries.

Recommendation 10

That NTC lead development of an EWD designed on an 'open standards' principle, such as that used for on-board recorders in the United States.

Recommendation 11

That NTC lead development of EWD policy under which the enforcement of the open standard for EWD being managed by the NHVR.

Recommendation 12

That NTC lead the development of an EWD that does not ramp up enforcement opportunities. The aim must be facilitation of compliance with fatigue rules.

3. Policy evolution

The concept of 'Driver-Specific Monitoring Devices' was first aired by the then National Road Transport Commission in the late nineties, as part of a first generation of national heavy vehicle driver work and rest hour rules. A few years later, after various Austroads projects, Transport Certification Australia (TCA) and its flagship product, the Intelligent Access Program (IAP) emerged.

As noted in an earlier ATA submission to NTC, the IAP model is highly scalable to achieve the kind of flexible policy ambitions expressed in some of Austroads' papers. Such ambitions include an unknown number of potential regulatory applications underpinned by remote 24/7 mandatory vehicle tracking on the broadest possible scale.

From 2006, government proposals for revised model fatigue laws saw the *Electronic Work Diary* (EWD) concept appear, refining the concept of driver-specific monitoring devices. The 2008 Heavy Vehicle Driver Fatigue National Model Legislation then established fatigue-related measures including the recording of work and rest times in a Written Work Diary (WWD) or EWD.

In the NTC work program, the first National Industry Productivity package (NIP1) for implementation in 2013-2014 includes *recognition of an operator's GPS system and industry accreditation schemes as alternatives to written work diaries*.

However, this EWD policy principle is not strongly expressed in the current proposal. In fact this 'recognition' may be quite temporary since the Pilot notes "take up of EWD would be expected to be considered when existing in-vehicle equipment is upgraded"¹ and that "...consideration should be given to recognising the duties and responsibilities of EWD service providers in the national law."

The EWD Pilot involved an operator/industry reference group but industry was not on the project steering committee. This and other concerns has led some industry stakeholders to conclude the proposed diary is merely a form of the Intelligent Access Program (IAP) for fatigue and speed. It is therefore important to reiterate the IAP has not delivered on its Regulatory Impact Statement (RIS) claims and it has been largely rejected by industry as an option for pursuing more vehicle access.

IAP was provided with a timetable supported by substantial public revenue over a long period to reach its target. The IAP did not meet that target. It would be wrong to dismiss the lapse of time as irrelevant to future policy planning and expenditure. It is also wrong to ignore the practical fact that heavy vehicle access is currently only possible in some cases if IAP is used and that that is not an example of a 'voluntary' model. Mandatory use of EWD and speed monitoring by regulators is not supported in general, nor specifically for accreditation schemes. Mandatory use of EWD and speed monitoring is supported in the case of supervised intervention orders as made by a court.

The funding that has flowed into the IAP, and threatens to flow into this proposal for an EWD system, might have delivered at least some high-quality upgrades to a few crucial sections of national infrastructure that would have also benefited every road user, not merely the 0.45%² of industry who use IAP and pay a portion of the total program costs. IAP and this EWD approach will merely monitor not prevent a crash. Vastly improved infrastructure, sensible and stable access policies with well-resourced, traditional enforcement practices would arguably have had a better effect on improving safety outcomes over the past decade. Long-standing alternative pathways to safety and compliance assurance such as the TruckSafe[®] program have also been overlooked.

4. EWD design

In 2013, the ATA wrote to the Standing Committee on Transport and Infrastructure (SCOTI) to provide its support for the development of an *optional EWD to assist drivers/operators to comply with Australia's complex work and rest rules*.

The ATA also gave SCOTI its support for the adoption of broad technical specifications, based on an 'open standards' principle, that enables operators to buy a commercial program for their business and drivers, containing an EWD and other functions, to suit their operational situation and legal requirements. SCOTI has also called for the recognition of existing operator systems as an alternative

¹ RMS, p13.

² Notes from the NTC's Review of the Intelligent Access Program Workshop held on 4 December, 2013.

to leasing new devices and the ATA has adopted this concept as the basis for the ATA’s position on EWD for heavy vehicle drivers.

The ATA accepts that in-vehicle devices, the Global Positioning System (GPS); and sophisticated transport-related software products are widely available³ and increasingly popular in the heavy vehicle transport industry. Industry’s concern over the use of telematics for regulatory purposes does not relate to the capacity of the technology to cater to regulatory ends, but to the policy foundations, system design, likely cost and effect, as well as its application by regulators.

Bureaucratic demands for corporate and personal private data are evolving rapidly because of the immense scope for information collection and the potential economy of the intrusion capability offered by technology. Although a search of private property would typically involve police, reasonable and probable cause and a magistrate’s warrant, the apparently quaint traditional principle of ‘innocent until proven guilty’ along with a policy focus on ‘fatigue’ itself seem to have been quietly discarded in the rush to capture more and more private intellectual property for new enforcement or revenue-raising opportunities. As part of further development of the EWD policy it will also be necessary to clarify which privacy regime outlined in the issues paper will ultimately govern the operation of the proposed remote monitoring framework.

EWD schema (TCA report, p8).

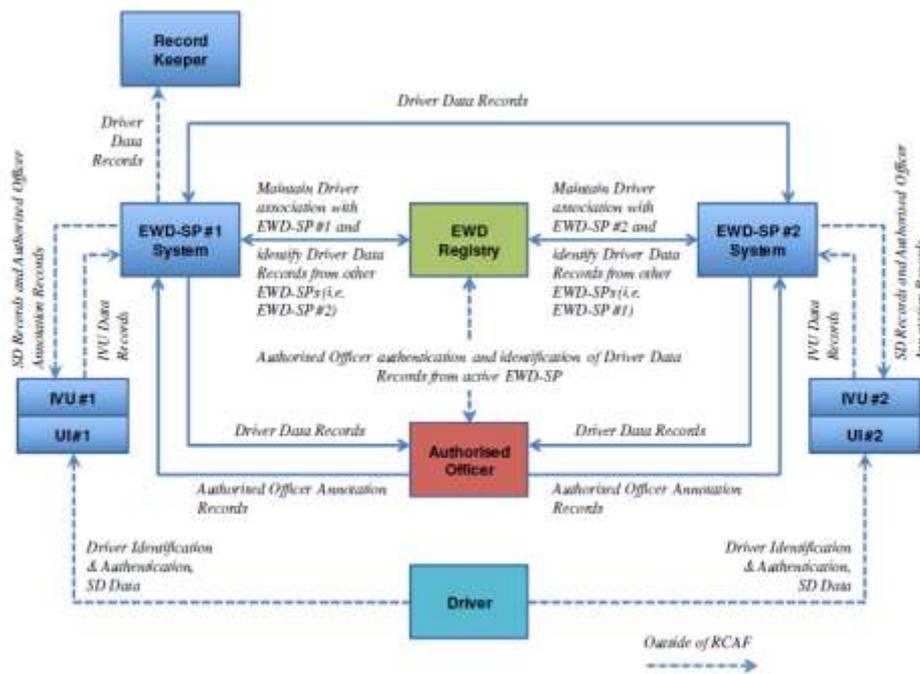


Figure 2: Remote Connection Access Framework (RCAF) architecture (Driver operating under two EWD-SPs / IVUs with EWD-SP #1 being responsible to inform the Driver’s Record Keeper)

One impression of this system is that it is an inflexible, elaborate over-reaction to administering a simple regulatory requirement for a work diary. A simpler, less expensive system is achievable.

³ “The telematics market is currently mature in Australia to the extent that there are a wide variety of products with varying capabilities available from a range of suppliers. IVUs can range in price from a few hundred dollars to around \$1,500 or more.” RMS Pilot report, p54.

5. Industry views on EWD

Amongst the many characteristics of the EWD proposal, some elements remain unresolved. One is the not so simple matter of balancing the theory of fatigue management against real world risk. Another is how to reconcile the precision of EWD time counting against the small yet beneficial amount of human imprecision allowed for completing work time in a Written Work Diary.

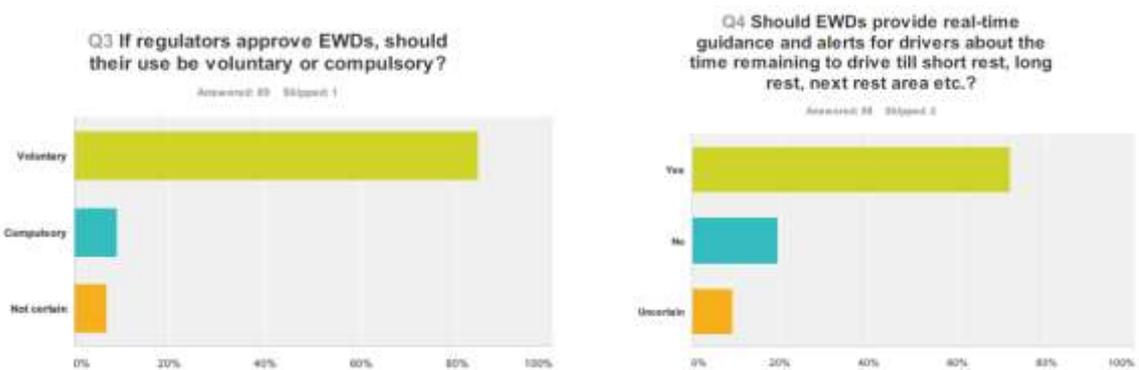
For example, the EWD will count time down to the minute/second, whereas a WWD records time in 15 minute blocks, using rounding rules with a bias towards rest. In effect, the driver has reasonable leeway with a WWD, thus the NTC has proposed an 8 minute non-accumulative tolerance to work time in EWD as a contingency plan to replicate the leeway that a WWD user has. While the proposal to remove 15 minute rounding for EWD is supported, the well intended tolerance proposal does not deliver similar effects to real world driver entries in WWD.

In preparing this submission, ATA member association NatRoad provided the following operator feedback on EWD from an online survey conducted in December of 2013 that yielded 90 responses.

The possibility of vastly more precise time-keeping elicited the most comments (79) of all NatRoad's survey questions and comments indicated overall that operators see minute-by-minute accuracy not as a feature of an EWD but a bug, with one noting "just because it's electrical doesn't mean it's perfect". Many respondents sought complementarity between EWD and WWD regimes to make it fair for everyone, but also questioned "why change the system because it is electronic?".

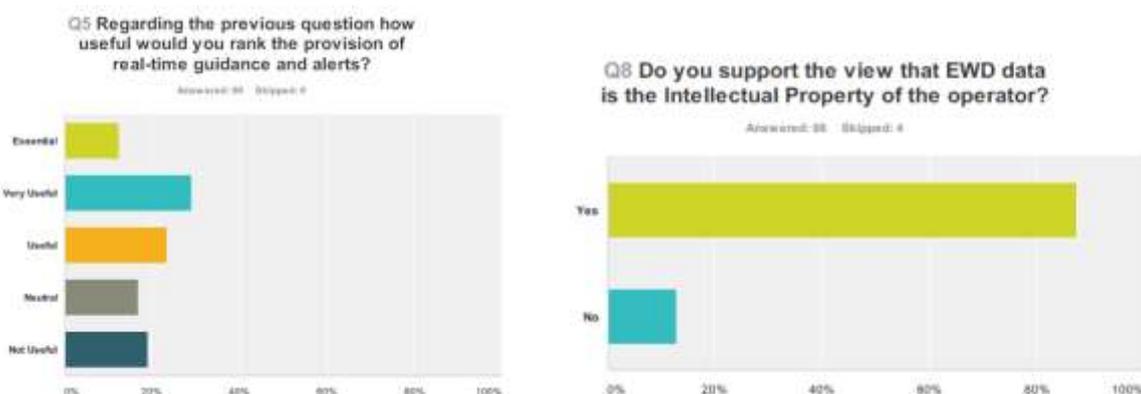
The prospect of more information flowing automatically to enforcement authorities also evoked responses that it could lead to 'self-incrimination' or 'to more opportunities for revenue, not fatigue management'. Some respondents felt 'drivers (companies) should work under similar laws' and that only limited information should be given to enforcement officers unless "relating to a serious breach". However, as one comment noted, regardless of what and how much data is actually available, 'enforcement needs to fit the breach'.

When asked if EWD should be mandatory or voluntary, 84 per cent chose "voluntary". When asked if EWD should provide real-time alerts to the truck driver about a legally required rest break or the next rest area etc, 71 per cent said "Yes".



Related comments included 'most drivers already know how much work time they have left'; that 'the major problem is finding somewhere to have a rest'; and "drivers already have enough distractions". Interestingly, the next question on alerts generated a positive response from 64 per cent of respondents, including 12 per cent who saw real-time guidance and alerts as "Essential".

When asked about EWD data, 87 per cent agreed this belonged to the operator. Some comments were also to the effect that an employer has statutory obligations to keep such records (as does the driver) and that such data is not the property of government.



When asked if EWD that also monitor speed and other offences for action by the authorities would be acceptable, 65 per cent of operators said no and 12.5 per cent said yes. One person warned that ‘too much information could be used in a detrimental way and should not be automatically accessible’. Interestingly, as with monitoring of time, the question of monitoring speed elicited a similar demand for a ‘tolerance’ of some kind. One vivid response was simply, ‘great...they won’t have to leave their offices to book the poor old driver!’

Some respondents also commented on current requirements to record a rest before taking the rest, which does not always mesh with reality. A driver should be able to forget to log a break, take a break and then correct the diary, all without effecting a breach and alerting the authorities. In the ATA model of a stand-alone driver-operator EWD, the operator can be alerted by such events and take appropriate actions to address driver behaviour back at base and, in so doing, meet their chain of responsibility obligations and maintain a culture of compliance in their own operations.

6. Timeframe, Management and Cost

“The equipment costs of an EWD for a Transport Operator will comprise two main elements and the following values were used in the cost benefit analysis (refer to section 7):

- *1 n-vehicle units – \$1,200 plus \$500 installation*
- *Monthly monitoring – \$20 per month per unit.*

In addition there will be costs to Transport Operators for establishing management reporting systems to enable the review of data from IVUs.”

RMS Pilot report, p55.

In addition to the survey feedback supplied above by NatRoad, the ATA has received advice from a member operator of a standard price of \$4230.00 for each telematics unit voluntarily fitted by the business to approximately 400 heavy vehicles. The itemised cost of just one of these units prior to installation (not including running costs) is as follows:

7050 (black box)	2,740.00
1035 (cable)	600.00
1039 (CAN cable)	200.00
<u>High gain antenna</u>	<u>130.00</u>
Total of Kit	3,670.00

Intriguingly, the Pilot report states in section 4.3.2.2, “The differential cost of a regulatory telematics device compared to a commercial product is not just the cost of the unit itself. Monitoring by the EWD-SP is required for an EWD and this recurrent charge can be greater than is levied for normal commercial services because of the increased evidentiary quality requirements placed on regulatory products.”⁴

At the same time, the report argues “the net present cost over five years for the preferred EWD model as lower than the net present cost of operating a WWD under all take up assumptions.” At a purchase price of approximately \$20-30 per WWD (with a typical take-up rate of perhaps four WWD per driver per year⁵) any savings under the proposed system appear to be realisable for transport agencies not for transport operators or drivers.

The RMS report also claims the ‘cost benefit analysis’ (not released to industry) shows a net present cost over five years for EWD as “lower than the net present cost of operating a WWD under all take up assumptions. At the lowest assumed take up level for an EWD (1 per cent) there is a net present cost saving of \$7.5 million over five years compared to a WWD.” Initial set up costs to establish the overall EWD environment are then estimated at \$9.9 million, including “\$4.9 million estimated for the EWD System Manager to be operationally ready to implement the EWD on behalf of the NHVR.”⁶

Industry asks why an ‘operational’ EWD trial was needed at a cost of \$5 million, when government knows the technology works and transport management products based on this technology are already used in industry anyway? This was a regulatory trial not a technology pilot, and one that failed to examine in depth the legal and operational implications of the evolution in EWD policy. For example, industry does not understand how it was a thorough trial when the most fundamental problem of counting time in 15 minutes blocks when using WWD versus counting in minutes in EWD was not resolved for the pilot, nor is it yet resolved.

Stakeholders have pointed out the broad impost on the public purse from this approach is greater if tax deductibility is taken into account. The taxpayer appears to pay several times, both for the set-up and running costs of a new, different (voluntary) regulatory system and then again each time a transport operator claims their set-up and running costs under the tax system. In the case of EWD, it is evident this will be a more substantial annual total claim than is current for WWD, particularly if a regulatory telematics service is more expensive than a commercial service anyway, as TCA claims.

For example, what is the continuous cost to industry from NHVR’s management of the EWD system? Will the \$9.9 million fee for EWD implementation include NHVR costs for managing both WWD and EWD systems? Does the government’s estimate include industry’s EWD costs?

With respect to the NHVR’s capacity to manage an EWD regulatory tool, its resources are already stretched from preparing for the substantial activity that lies ahead from 10 February 2014. Its forward work program is also full of important policy issues which, due largely to NHVR’s complex establishment activity during 2013, have seen little progress against agreed timeframes. Similarly, the NTC has an extensive schedule of overlapping policy development work such as finalising the heavy vehicle compliance and enforcement framework, telematics framework, cooperative intelligent transport systems initiative and the IAP Review amongst other items. Industry is also not broadly convinced that the burden of the TCA’s Intelligent Access Program (IAP) currently undertaken by a handful of operators (0.45% of industry⁷) is warranted by the real-world

⁴ RMS Pilot Report, p54.

⁵ In which each WWD has 100 pages and at least four could be needed for recording an entire year.

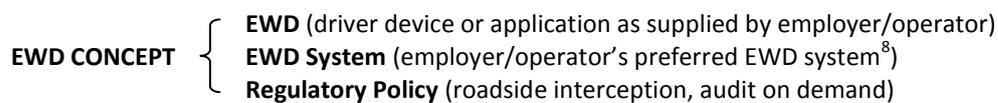
⁶ p13.

⁷ Notes from the NTC IAP Review Workshop, 4 December 2013.

risk. What are the issues that road agencies need IAP to manage? The existence of perfectly suitable alternative pathways towards compliance assurance can also not be ignored any longer. It is industry's fear the EWD model as described will result in a flood of data that is not easily managed by road agencies. Apart from the potential for unjust delays in notification and expensive errors from data mismanagement, potential also exists for retrospective avalanches of infringements to fall on operators and drivers. It seems obvious the EWD model represents a new iteration of a heavy-handed system like the IAP since it does not seem to be focused on better fatigue management but on vehicle operations. It has sought to redesign policy to force a change in practice to suit a new technology – a completely opposite development approach to that desired by industry.

7. An Alternative Approach

The outline of a lighter-touch regulatory model might look like this:



This would distinguish itself from the proposed system through the use of open standards and the absence of third parties including technology service providers intervening in what should remain a direct legal relationship between the regulator and the regulated. Roadside interception of driver EWD devices or applications and audits of their operator EWD systems would be undertaken by authorities as required. Central to the design principles would be what the law currently states, what drivers do in practice, and what should apply when a EWD is used.

Driver Use

“Electronic record keeping could allow information on time and location (if a GPS unit is part of the device) to be filled in automatically. However, the fact that working hours, not driving hours, are prescribed in legislation means that the driver must be able to record work done away from the vehicle. The electronic record is the driver’s – and it must be able to be read, and written to, by any device approved as an EWD, to allow for the many drivers who have more than one employer, or move between employers and vehicles.”

Australasian College of Road Safety Journal 2011. Volume 22, p13.

The single most important safety feature in any truck today is the driver. The driver and the vehicle should be treated differently under law. Both the law and government policy speak of ‘fatigue-regulated vehicles⁹’ yet of course, machines do not get tired. Thus it is *human fatigue*¹⁰, rather than vehicle operations that provides a fundamental policy rationale and focus for development and regulation of a work diary.

A truck driver may be at once their own operator/employer and also take on other employers and employees, work under various ad hoc or formal contractual arrangements, drive different vehicles and combinations (sometimes two-up), adhere to different operator systems and undertake different freight tasks. Thus it must be a *driver’s hours* (at work, driving, and at rest, irrespective of location or distance travelled), not a vehicle’s activity, that is the logical object of regulatory scrutiny for improving driver compliance with fatigue laws (thus hopefully improving safety).

⁸ An operator would select a commercial service provider to support their preferred EWD system and deploy the associated devices or products (eg EWD mobile application) amongst their employees. Each driver using their system through an app or device would have a unique account.

⁹ HVNL, s7.

¹⁰ HVNL, s223.

Use of an operator's EWD device or application should allow drivers to create, annotate and retain EWD records to suit their circumstances, their private contractual relationships with vehicle owners/employers and any personal legal or evidentiary requirements. If a driver may be prosecuted for a declared history of work and rest then they must be able to annotate and furnish that history easily and at little expense to themselves. With respect to inspection of EWD by authorised officers, this should be limited to inspection of records for the current fatigue period only. On the other hand, if an EWD system or a driver device stops working, or may have been tampered with, the operator responsible for that EWD system should inform the regulator of this fact.

This would help drivers with their unique work programs and histories, to move seamlessly between vehicle owners/operators/employers, between tasks and between vehicles and yet still provide a verifiable trail of data via a system of unique identification numbers. If numbering systems for WWD and EWD are integrated, their parallel use can be identified at the roadside. When a driver crossed jurisdictions, an EWD would accommodate not just daylight saving differences but deliver fatigue information and alerts applying while the driver is working across the border. Location and speed data can be recorded by an EWD and should be able to be used by a driver as a defence against incorrectly issued infringements.

The NTC says "While a driver recording device (DRD) may be used as an *auxiliary feature*, the system will be based on a remote connection access framework for enforcement and reporting purposes. This means that, unlike WWDs, the data will be more easily accessible from a range of locations."¹¹

The distance that a vehicle travels (eg. more or less than 100 kms) is not necessary for assessing driver fatigue. Short-distance freight tasks can be highly fatiguing if the task in question is complex yet time-sensitive; repetitive yet labour-intensive; and undertaken in congested urban areas, in poor weather or at night with limited access or curfews. The same fundamental records of driver activity are still required, as defined under work rules in s289 (1)(2) of the HVNL.

On a day-to-day basis, a driver's operator/employer is required (as chain party responsible for shift scheduling and vehicle selection) to check driver diaries and manage driver welfare under chain of responsibility obligations. The driver's personal EWD tool¹² should be linked to an operator's chosen EWD system and allow them to record and display their work history on demand. It would not need to be viewed by regulatory authorities until intercepted by roadside enforcement or regulatory audit. That is, interrogation of a professional driver's record should remain a matter of reasonable cause within the traditional enforcement relationship which exists between a driver and authorities such as in the case of Written Work Diaries (WWD).

The *utility* of a work diary format to drivers is a key to its uptake and success. Notwithstanding potential for government to use non-market, coercive powers to force adoption, any product or service will be contemplated by industry if it is cheap, easy to use and reliable. If it is all of these *and useful* it will be demanded by industry and this will stimulate the supply of technology. The EWD concept outlined does not indicate that this is the market effect envisaged. The primary element of utility that drivers want is to avoid making errors when adhering to the some 54 rules they are measured against under work diary requirements. Requirements to carry or produce EWD printouts should be removed since records will be remotely accessed by roadside inspectors.

The voluntary introduction of EWD should be a means to facilitate improved driver compliance with fatigue management requirements, rather than a means for merely enabling increased law enforcement. To achieve this, a key feature of an EWD service is to incorporate notices, updates and

¹¹ '1.4 Key features of the EWD'. NTC.

¹² Such as a driver's mobile phone loaded with the operators' preferred diary software.

alerts for drivers to warn them of imminent breaches or pending rest breaks etc. Any EWD service should enable drivers to plan their driving schedule more actively and take advantage of 'real time' information relating to both their personal fatigue management requirements and the road conditions actually being experienced. Such functionality should also empower drivers to take greater charge of their work schedule, rather than always primarily responding to complex and burdensome regulatory requirements which is thought to be an important source of driver stress and fatigue.

With regard to 'automation' (3.1.3 - *EWD functions not likely to require personal information*), by arguing for changes to the law, the EWD model creates new roles and possible liabilities for third parties such as service providers and government. Presumably, the more automated the EWD system and the more functions that are taken from the driver for processing through an in-vehicle system, the less responsible that driver (and their operator) is for data accuracy or management and the greater the responsibility that is placed on regulated service providers and government agencies.

On the other hand, if required driver information is not automated in EWD, then it is difficult to understand why a technology solution is proposed in the first place. EWD have to be better and at least as accurate and economical as a WWD to warrant a change in diary usage. Drivers without reasonable English literacy, those who also use a WWD, or drive two-up, would no doubt benefit from a highly automated systems that demands little manual input but delivers a lot of output in the form of driver guidance and alerts. Such telematics systems are already available to operators to manage drivers and are sophisticated and economical products for operators because they also offer other useful fleet and vehicle management functions at the same time. The only problem is the driver still needs to generate a WWD record.

Simply because a 'tool' such as telematics exists that a government might hypothetically use to monitor private sector activity does not make its use sensible, ethical or without risk. NTC policy requirements should aim to manage fatigue in drivers by creating appropriate compliance rules on drivers and their operators/employers, not creating potentially complex roles and liabilities for third parties. Policymakers should not seek to re-engineer the law to fit wider regulatory aims without significantly more analysis and consultation.

Regulatory Use

*"When the national law and regulations commence, the National Heavy Vehicle Regulator (NHVR) will be looking after one rule book for heavy vehicles over 4.5 tonnes gross vehicle mass."*¹³

NHVR website

NTC's use of the term, *EWD regulatory environment*¹⁴ suggests a unique regulatory environment exists (or should exist) for an EWD separate to that of a WWD. Different regulatory treatments interfere with the principle of 'equality before the law', will not give confidence to industry about a level-playing field for drivers nor suit the uniform treatment of industry expected from the National Heavy Vehicle Regulator (NHVR) when it formally commences on 10 February, 2014.

Nevertheless, the EWD model needs extensive changes to the Heavy Vehicle National Law (HVNL) to suit its newly evolved policy ambitions. For example, the NTC refers to a minimum of 21 potential amendments, such as entrenching the role of IT service providers in the HVNL, and the proposal

13 NHVR website, accessed 18 December, 2013: <https://www.nhvr.gov.au/law-policies/heavy-vehicle-national-law-hvnl>

14 'EWD regulatory environment: The framework within which the EWD functions, which has regard to who regulates, certifies and audits the EWD system.' (NTC Glossary, p63).

seeks to make recommendations “..that would remove ambiguity in the national law and ensure it is effectively aligned and ‘keeping pace’ with the technical and policy outcomes of the Pilot”¹⁵.

This is echoed by the RMS Pilot report in relation to technical specifications, “there are a number of legislative changes that are required to support the operation of an EWD. These issues will need to be addressed before wide scale deployment occurs.”¹⁶

The current regulation with regard to WWD includes a “counting time rule, which mandates that work time be rounded up to the nearest 15 minutes and rest time be rounded down to the nearest 15 minutes. As drivers are not machines they commonly choose to stop if an opportunity arises (e.g. to use a vacant rest area) and they move on when there is a need to move on. Under the HVNL, a driver’s time spent outside the vehicle may be considered work even when the ignition is off and the in-vehicle EWD device is not recording any vehicle activity/location data. For example, the definition of a driver’s ‘work’¹⁷ under the HVNL includes loading/unloading freight and helping another person to load/unload freight; inspecting, servicing, repairing, cleaning or refuelling the truck and even performing ‘marketing tasks in relation to the use of the vehicle’, amongst other possible driver-related work responsibilities.

Fatigue rules are based on the theory of suitable hours of work and rest for this industry. This means drivers are disadvantaged in that they must continually convert real time into regulated time. For a driver who uses frequent short rest breaks to manage his fatigue, this may result in a “loss” of valuable work time. For example, a driver might work for 8 hours 38 minutes in several short stints, but when converting this actual time to regulated time he must declare 10 hours 15 minutes in his work diary. The same applies in reverse when recording rest time.

On the surface, the NTC’s proposed “8 minute non-accumulative tolerance”, for any period above the prescribed hours without a breach being recorded, is appealing, but there are consequences from more precise time counting. Each time the tolerance option is used, it needs in effect to be “paid back”. This need not occur with WWD, since a driver can apply his own ‘fuzzy logic’ around the blocks of time with some degree of confidence in a practical sense, given this approach is applied to both rest and work periods. However, it is difficult to argue that any tolerance should apply to rest time, even if in practice some WWD users choose to do so. Other options could include using the current approach; setting an alternative period of ‘tolerance’; modification of penalties; alternative compliance approaches; or allowing off-sets for specified periods. Regardless of the tolerance applied, a driver should be able to use their EWD device to record their reasons for supposed ‘breaches’.

Focus must be maintained on encouraging drivers to comply with road rules and fatigue laws, rather than on inventing parallel, complicated enforcement policies that, amongst other things, entrench new roles for actors residing outside the chain of transport responsibility. Regulatory focus should also be directed towards constructing positive duties and offences that better reflect the expected behaviours of chain parties, thereby allowing penalty notices to be used.

The Pilot report (section 5.3.1.5) explores the option of on-screen displays for diary records if IVU are included in the concept. The ATA has repeatedly made it clear that “route compliance” and “route compliance assurance” can be achieved by a variety of means and the IAP system is one inefficient way. Alternative pathways are quite valid and include recognition of industry’s existing take-up of electronic devices and technology services, including integrated in-vehicle systems. This

¹⁵ NTC, p8.

¹⁶ RMS, p13.

¹⁷ HVNL, part 1.2 Interpretation.

would be done through open standards and co-regulation. In fact, this is often considered best practice. It is clear that industry does not consider IAP as best practice.

Regulators need to move on from merely infringing drivers and operators if they wish to improve road safety outcomes let alone driver safety. If agencies are pursuing compliance and really do not want to undertake enforcement using IAP/EWD data then agencies should accept amendments of the law to include a provision that prohibits automated enforcement, to satisfy one of industry's fears. The fear of automated prosecution is alive and well and the NTC's heavy vehicle compliance review can address this.

EWD Implemented as Proposed

"Authorities have emphasised that the growing freight task and limited resources will almost inevitably require a paradigm shift in the way that compliance with fatigue and other regulations is achieved...the implementation of EWD was seen not as the translation of a written document into an electronic form, but rather as a tool that is part of an emerging alternative compliance and enforcement approach."

RMS Pilot report, p56

Although the ATA does not accept the EWD proposal, it is worthwhile to consider what the corollary of its implementation might be. That is to say, if this model is imposed on the fairly simple regulatory requirement for some truck drivers to keep records of work and rest hours, what could be some natural and welcome consequences from this new policy 'paradigm'?

Unfortunately the regulatory Pilot did not investigate this prudent question, saying "While the Pilot has identified that the EWD can support alternative compliance approaches where there may be increased back office investigation and reduced emphasis on roadside enforcement, the consideration of any benefits associated with such a policy change are beyond the scope of the Pilot and accordingly have not been considered in this analysis."¹⁸

So, it is for industry to offer some suggestions. First some basic policy assumptions, namely that:

- TCA-suggested products and services are commonly used in the transport industry;
- industry technology uptake is growing quickly (in the absence of IAP or EWD);
- industry's capacity to invest in products over and above operational need is dependent on cost and utility, not coercion;
- road safety, including fatigue-related incidents, has greatly improved over the past four decades;
- state agencies and police manage limited compliance and enforcement budgets; and
- new national transport policy is directed towards, inter alia, better road freight infrastructure.

This leads to other questions such as which of the current enforcement approaches will be used to defray the costs of the new EWD? Given that state and Commonwealth C&E budgets are limited, which older, less sophisticated regulatory measures should make way for the introduction of this new advanced telematics monitoring system?

Here are some suggestions:

1. Removal of roadside enforcement devices

Claims made by some agencies for telematics systems are so impressive that much fixed road infrastructure presently dedicated to truck compliance (average speed cameras, safe-T cameras etc.)

¹⁸ RMS Pilot report, p92.

appears superfluous and could be greatly reduced in number or simply eliminated due to expense. Otherwise, telematics proposals like EWD (and IAP) represent an additional, elaborate and expensive over-reaction by policymakers to a decreasing risk. Savings should be available to regulators and industry from prudent transfers of resources.

Since fixed cameras also issue infringements to vehicle owners not drivers, these roadside devices are insufficiently responsive to new regulatory aims of directly managing driver fatigue and speed.

2. Concessions for EWD-regulated vehicles

With an elaborate EWD/speed monitoring system in full swing, it would be necessary for police and road agencies to consider special treatment for EWD-regulated vehicles. For example, in return for 24/7 surveillance of legal private vehicles, it is logical that such a heavily-monitored vehicle be given automatic access to the operator's preferred freight routes, that road authorities provide green light corridors where possible as well as exemptions from random roadside enforcement events. If this seems somewhat extreme, it merely is the logical counterpart to exemptions from roadside interdiction possible under NHVAS (which after all is merely a paper-based accreditation system, not a monitoring technology).

3. Liability and the Chain Of Responsibility

The suggested *driver-operator EWD system* limits the role of unrelated third parties, eg. IT service providers, and reinforces the traditional policy and legal relationship between actors in the transport supply chain and government. A light-touch regulatory approach would seek to keep the onus and therefore liability for compliance with fatigue law on the operator/employer and driver.

8. Conclusion

The ATA believes it is premature to advance the EWD proposal until the policy is further developed by the NTC.

The NTC has previously referred to the road transport industry's long-term safety record as a 'success story' overall and this submission also does not dispute the immense advantages and possibilities that technology brings. Many Australian operators today purchase advanced in-vehicle systems and hand-held devices that help their businesses. Concerns lie with how the appeal of technology can distort effective policy-making.

The EWD approach should describe a simple and cost-effective compliance instrument for government to oversee, that is easy and voluntary for a driver to use, inexpensive for operators to implement and the same in legal effect as a WWD. Responsibility for administering fatigue measures rests with government not service providers, responsibility for diary-keeping rests with drivers and their operators whether they are using WWD or the finest commercial EWD system they can afford. . The current model has technical issues, including time-counting, that do not compare favourably with WWD thanks to the unnatural precision afforded by digital time-keeping when applied to human behaviour rather than mechanical activity.

Governments should not meddle with the voluntary industry adoption of technology since this is leading to greater safety and compliance assurance and also demonstrates the ongoing efforts by industry operators to build safety cultures into their businesses.

It would be similarly wrong for government to use its regulatory powers to intervene in the wider technology market. The road transport industry comprises mostly small operators with fewer than five trucks, and larger enterprises with tens or hundreds of vehicles. Large or small, each of these businesses makes hundreds of decisions every week in relation to operational safety, productivity and viability. Such decisions include purchasing decisions. The combined effect of thousands of transport operators individually choosing and investing in this product or that system generates the momentum for product innovation and lower costs in the technology sector that can only help industry's long-term capacity to be compliant, safe and financially viable.