

Submission to: The National Transport Commission

Title: Time Counting and Residual Fatigue Risk Internal Consultation Draft

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Contents

1. Introduction	3
2. Australian Trucking Association	3
3. Recommendations.....	3
4. Discussion of NTC’s Consultation Draft Paper	3
4.1 Amendment to Heavy Vehicle National Law and Regulation	3
4.2 Informed Policy Change proposals	4
4.3 Proposal to review Standard Driving Hours	5
5. Technical comments on parts of NTC’s Paper	6
6. Conclusion.....	7

1. Introduction

The National Transport Commission (NTC) continues to develop and maintain nationally consistent road, rail and intermodal transport reforms to improve safety, productivity and environmental outcomes. The NTC currently seeks to clarify the fatigue time counting practices following industry complaints about unfairness and in response to judgements in courts of authority. The ATA is resolute that intended time counting policy should be delivered.

The NTC has released a discussion paper for limited circulation, as intended legislative actions are minor. They also propose a broader review of standard driving hours which the ATA believes is not warranted.

2. Australian Trucking Association

The 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.

3. Recommendations

Recommendation 1

The ATA recommends that the Heavy Vehicle National Law be amended to clarify that a 'relevant major rest break' means the longest continuous rest break required in a given period for each work and rest hours module. This recommendation follows the NTC's recommendation.

Recommendation 2

The ATA recommends that the NTC and the NHVR collaborate with industry, the insurance industry and governments to develop a national framework to collect real life operational data to better inform future fatigue policy. This recommendation follows the NTC's recommendation.

Recommendation 3

The ATA does not support the NTC conducting a further review of the Standard Driving Hours module in coming years. This recommendation is contrary to the NTC's recommendation.

4. Discussion of NTC's Consultation Draft Paper

The NTC has provided a draft internal consultation paper aimed at settling three recommendations to the Transport and Infrastructure Council (The Council) ministers. The first recommendation responds to operational differences between agencies and associated concerns, while the second relates to a decision in the Court of Authority about counting time. The third seeks to amend the NTC's forward work plan to include a review of standard driving hours.

4.1 Amendment to Heavy Vehicle National Law and Regulation

The ATA agrees that the definitional question of what 'relevant' means in 'relevant major rest break' in the Heavy Vehicle National Law (HVNL) requires immediate resolution and clarification. This is answered in the work diary instructions but not in the legislation itself.

‘Relevant’ should mean the longest continuous rest break required in a given period for each work and rest hours option, consistent with the New South Wales *Trinci* decision¹. In the *Trinci* decision ‘relevant’ means applicable to the fatigue management module under which the driver is operating.

For example, a driver using Standard Hours must have at least seven hours continuous rest in twenty-four hours, and the relevant twenty-four hour period for considering compliance begins from the end of last long rest break.

This policy position also builds upon the NTC’s 2007 advice to the ATA that ‘relevant’ would be commonly understood in the ‘allowed hours’ tables and hence their view at the time the word did not need to be included. While the New South Wales *Trinci* decision reflected this view, the NTC has finally accepted the ATA position that the word relevant needs to be included. Further, the definition of what is a long rest break must be defined for each scheme, as the definition differs across schemes. The ATA therefore supports the NTC’s first recommendation.

Recommendation 1

The ATA recommends that the Heavy Vehicle National Law be amended to clarify that a ‘relevant major rest break’ means the longest continuous rest break required in a given period for the appropriate work and rest hours module. This recommendation follows the NTC’s recommendation.

4.2 Informed Policy Change proposals

At the NTC’s stakeholder working group meetings most workshop participants agreed it would be premature to prepare an options paper for public consultation, as there is not a clear definition of ‘nose-to-tail’ practice. There is also inadequate evidence in relation to whether these schedules are a problem that justifies regulatory intervention.

The ATA has not been shown any examples of the claimed ‘nose to tail’ work patterns over a full 28 day cycles that demonstrate a fatigue risk occurring. The ATA believes the current rules have adequate controls and offsets to ensure drivers who do use the so called ‘nose to tail’ work patterns do so safely. Also, the ATA cannot see any commercial advantages to ‘nose to tail’ work patterns that might encourage their use. The rules were debated for seven years and included consideration of numerous expert opinions. These rules have been implemented for several years now. There is no doubt fatigue crash data is showing a reduction in incidents, as readily determined from the National Truck Insurance (NTI) continuing series of Major Accident Investigation Reports or the Bureau of Infrastructure, Transport and Regional Economics’ data.

The ATA supports the view that any further changes to fatigue rules after the above clarification amendment needs to be evidence based. Accordingly, the ATA believes the NTC and the NHVR should collaborate with industry, insurance providers and governments to develop a national framework to collect real life operational data to better inform broader fatigue policy directions in the future. This would involve analysis of the work diaries/shifts associated with recorded incidents. Capturing data over longer timeframes would provide more informative data than that currently available. This analysis should also include seeking data from existing AFM operators and Pilot AFM operators, as these parties have many millions of kilometres of excellent safety outcomes that cannot be ignored.

Recommendation 2

The ATA recommends that the NTC and the NHVR collaborate with the industry, insurance industry and governments to develop a national framework to collect real life operational data to better inform future fatigue policy reform. This recommendation follows the NTC’s recommendation.

¹ *Roads & Traffic Authority of NSW v Frank Trinci* [2011] NSWSC 211.
ATA Submission: NTC Time Counting and Residual Fatigue Risk Internal
Consultation Draft

4.3 Proposal to review Standard Driving Hours

The NTC have stakeholders who do not accept that current rules adequately manage the potential risks from 'nose to trail' work patterns. In order to try to placate them the NTC has suggested a review of the Standard Driving Hours be undertaken.

The ATA is horrified that the NTC makes such a suggestion. The NRTC and NTC have conducted two extensive reviews of the fatigue laws, one around 1995 and another one spanning from 2000 to 2007. The outcome of the last review is still being implemented and bedded down as is evidenced by this very process. As a result of these processes, we have an actively improving fatigue management outcome. The ATA sees no basis for opening the debate about Standard Driving Hours (SDH) or Basic Fatigue Management (BFM) hours again until we see meaningful evidence of inadequate on-road safety outcomes or other sound drivers for a need to review.

With regard to some points raised in the NTC paper around this matter, we offer the following comments.

The NTC paper states: Insufficient sleep – taking only the minimum seven hour 'major rest break' for rest between long work periods, as the driver is likely to have six hours or less of actual sleep.

The ATA response: The seven hours long rest break has its basis in fatigue experts' advice that six hours sleep was required to provide restorative rest in SDH, therefore the rest break should be seven hours. What has changed?

The NTC paper states: Long work shifts – where a single 'work opportunity' or shift is longer than twelve hours.

The ATA response: The SDH does not allow more than twelve hours driving in any relevant twenty-four hour period. Therefore, the NTC claimed justification is not sound.

The NTC paper states: Circadian impacts – undertaking a work schedule that impinges on the natural circadian cycle, including work during the night, sleeping during the day and starting shifts in the early morning or at significantly different times on consecutive days.

The ATA response: The SDH was developed with adequate controls based upon expert advice to address rest needs of drivers over a 28 day work cycle. BFM includes specific offsets to address the potential increased risk under that more flexible scheme. Therefore, the NTC claimed justification is not sound.

The NTC paper states: Frequent nose-to-tail schedules – particularly consecutive nose-to-tail schedules.

The ATA response: The SDH was developed with suitable controls based upon expert advice to address the rest needs of drivers over a 28 day work cycle, and no evidence has been brought forward that so called 'nose to tail' work patterns can occur in a way that is unsafe given the controls that apply.

The NTC believes the above concerns regarding broader fatigue risk factors, in addition to those associated with nose-to-tail style schedules, would be best considered holistically as part of a Standard Hours review.

The ATA strongly disagrees, as stakeholders including road agencies, police, industry representatives, experts and community groups spent seven years debating the current rules. The current rules have produced safety gains with crash and incident data showing a marked reduction in incidents. There is no basis to open these issues again. At best, a few minor alterations to

improve fairness and refine the practical application of the law are needed as part of on-going maintenance of reforms.

We note that governments still have not taken adequate steps to meet their duties under fatigue legislation. We further note changes to SDH, that would reduce work hours, would compound the current shortfalls in rest areas and change over opportunities.

Further, reducing allowed driving hours has potential to lead to major structural change in the industry and its ability to service demand introducing significant inefficiencies. For example, overnight transport between Sydney and Melbourne can be achieved by SDH, and this is a clear expectation of the community. But the real journey time is not different now to that journey in 1995 or 2000. If that journey cannot be completed under a revised scheme by a single driver at least 85% of the industry would be excluded from this market and all similar markets. Such a reduction in competition will have consequences.

Recommendation 3

The ATA does not support the NTC conducting a further review of the Standard Driving Hours module in coming years. This recommendation is contrary to the NTC's recommendation.

5. Technical comments on parts of NTC's Paper

Page 14

"Using 'nose-to-tail' schedules, it is possible for a solo Standard Hours or BFM driver to work up to sixteen and a quarter hours when counting a twenty-four hour period from the end of a short rest within the driver's first work opportunity (ie, counting according to the amended counting rule that was previously in place in South Australia and Victoria). However, the driver will still be legally working up to twelve hours (Standard) or fourteen hours (BFM) in the twenty-four hour periods that must be counted (ie, from the end of relevant major rest breaks)."

The critical point that the driver must take a seven hour long rest break between the two long periods of work and other mandatory short rest breaks is not made and it should be. Further, later on in the same page the fact that there is a suite of rules to prevent re-occurring nose to tail shifts is not adequately explained. The fact is if a driver consumes hours early in the 28 day cycle they are disadvantaging themselves later in the full cycle. The checks and balances that exist, work.

Page 16

"The AFM RCS indicates that some schedules currently possible under Standard Hours and BFM, including nose to tail schedules, are 'high risk'." AFM RCS means Advance Fatigue Management Risk Classification System.

The AFM RCS was developed to screen AFM applications. In screening the AFM applications the tool has three outcomes. Green light, no further assessment required. Orange light, check if offsets are required and red light consideration by fatigue expert group required, as offsets may need to be tailored to the situation. The experts who developed this tool and the NHVR gave the ATA and NatRoad an assurance that the tool would not be used to assess existing driving hour rules. We were all aware that applying the assessment tool to SDH would potentially generate non- green outcomes as the tool was designed to flag potential risks and did not necessarily account for all possible risk offsets.

Accordingly, we are surprised by the NTC's reference to, and misuse of, the AFM RCS tool in this discussion paper. We doubt that the tool has adequately been applied to 'nose to tail' work practices as no one has shown us a 28 day cycle using nose to tail work practices that complies with SDH and demonstrates unacceptable risk, or shows risks not controlled by the suite of rules.

These comments also apply to NTC discussions at page 17. In summary, the AFM RCS is not designed nor intended to be applied for purposes outside screening AFM applications. Further, industry has not been convinced that AFM RCS is workable or credible as its application to 'proven safe' fatigue pilot (and AFM) operators with many millions of safe kilometres demonstrates it is a problematic tool.

Page 22

In response to the discussion under the NTC request for advice "heading", the ATA needs to put on the record that the ATA was not provided with the opportunity to comment on the 'terms of the request for advice' before it was issued. If we had been provided the opportunity, we would have made suggestions to improve the questions and therefore be more likely to value the advice. Currently, as we disagree with many aspects of the request we do not believe the resulting advice adequately reflects the full impact of the fatigue management controls currently in place.

6. Conclusion

The ATA cautions that determining whether or not the purpose and intent of the fatigue laws are actually undermined by 'nose to tail' work opportunities depends upon the driver's activities in the rest of the 28 day cycle. The ATA notes that a compliant driver working within the total 28 day cycle manages risk well, so despite the inputs from concerned parties the ATA is still not sure what the problem is. Evidence of legal cycles by drivers that cause unacceptable fatigue is lacking.

The ATA does not have an appetite to revisit Standard Hours or BFM. Time benefits associated with better highways are lost as urban congestion increases. The twelve hour work timeframe is linked with national geography, as is fourteen hours, and in an environment of improving safety outcomes; what would be the motivation for such reviews?