

**INQUIRY INTO PRESSURES ON HEAVY VEHICLE
DRIVERS AND THEIR IMPACT IN NEW SOUTH WALES**

Organisation: Highway Advocates Pty Ltd

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Inquiry into the pressures on heavy vehicle drivers and their impact in NSW

Submission by Highway Advocates Pty Ltd

1. Highway Advocates Pty Ltd is an incorporated legal practice with a predominant focus on offences and matters that affect heavy vehicle drivers and operators in NSW. Since commencing operation in May 2021, Highway Advocates has represented drivers and operators in Local and District Courts throughout NSW.
2. Three main prosecuting authorities in NSW prosecute offences against heavy vehicle drivers and operators. They are:
 - a) NSW Police,
 - b) The Heavy Vehicle National Regulator (The Regulator) and
 - c) Transport for NSW (TfNSW)
 - d) The NSW Environment Protection Authority (EPA) also has jurisdiction over certain Acts and Regulations.
 - e) Local Government in NSW may also nominate staff to become enforcement officers under the Heavy Vehicle National Law (NSW) to undertake activities that ensure heavy vehicles comply with mass enforcement on local roads.
3. The NSW legislation with a primary focus on heavy vehicle drivers and operators is as follows: -
 - a) *Heavy Vehicle National Law (NSW) as applied by the Heavy Vehicle (Adoption of a National Law) Act*
 - b) *Road Transport Act 2013*
 - c) *Road Rules 2014*
 - d) *Crimes Act 1900*
 - e) *Roads Act 1993*
 - f) *Dangerous Goods (Road and Rail Transport) Act 2008*
 - g) *Fines Act 1996*
 - h) *Fines Amendment Act 2019*
 - i) *Heavy Vehicle (Fatigue Management) National Regulation*
 - j) *Heavy Vehicle (General) National Regulation*
 - k) *Heavy Vehicle (Mass, Dimension and Loading) National Regulation*
 - l) *Heavy Vehicle (Registration) National Regulation*
 - m) *Heavy Vehicle (Vehicle Standards) National Regulation*
 - n) *Road Transport (Driver Licensing) Regulation 2017*
 - o) *Road Transport (General) Regulation 2021*
 - p) *Road Transport (Minimum Toll Expenditure Calculation) Order 2016*
 - q) *Road Transport (Vehicle Registration) Regulation 2017*
 - r) *Fines Regulation 2020*

Complexity of Legislation

4. The sheer volume of legislation and the complexity of technical terms within it present a significant challenge for heavy vehicle drivers and operators in NSW. According to the Australian Government Style Manual, approximately 44% of adults read at literacy levels 1 to 2, which is considered a low level of literacy.

5. The prevalence of applicable legislation poses a problem for heavy vehicle drivers and operators in NSW simply because of its complexity and preponderance of technical terms. The Australian Government Style Manual¹ provides that in Australia:
 - *about 44% of adults read at literacy level 1 to 2 (a low level)*
 - *38% of adults read at level 3.*
 - *about 15% read at level 4 to 5 (the highest level).*

People at a reading level 1 read at a primary school equivalent level. They can understand short sentences.

6. On the balance of probabilities, many truck drivers and operators would fall into the level of 1 to 2. Truck Drivers and Operators are often referred to as 'Professional' The Australian Government Labour Market Insights² (*Market Insights*) provides that Truck Drivers (General) may do the following tasks: -
 - Manoeuvres vehicles into position for loading and unloading.
 - Loads and unloads vehicles using lifting and tipping devices.
 - Observes safety requirements when loading and unloading vehicles.
 - Makes regular quality checks of vehicles to ensure they can be driven safely.
 - Estimates weights to comply with load limitations and ensure safe distribution of weight.
 - Ensures goods are stowed and securely covered to prevent loss and damage.
 - Verifies loading documents, checks condition of goods and obtain certification of deliveries.

7. The *Market Insights* provides that '*formal qualifications are not essential to work as a Truck Driver (General). Although some workers have a certificate III or IV in driving operations.*' *Market Insights* also informs that the average age of a truck driver in Australia generally is 48. The average age of a Tanker Driver is 50.

¹ <https://www.stylemanual.gov.au/accessible-and-inclusive-content/literacy-and-access>

² <https://labourmarketinsights.gov.au/occupation-profile/truck-drivers-general?occupationCode=733111>

Embracing Plain English

8. In summary, the majority of truck drivers and operators in Australia possess below-average literacy skills and are approaching middle age. This demographic faces difficulties in comprehending legislation that is not drafted in a clear and straightforward 'Plain English' style.³
9. The concept of "plain English" has been embraced by various countries, including the USA, the UK, Canada, and Australia. While different approaches exist, the common goal is to simplify official writing by removing unnecessary complexity and obscurity.
10. Legislation must be drafted in a manner that can be easily understood by the majority of those to whom it applies. Simplifying the language and structure of road transport legislation is essential to ensure that heavy vehicle drivers and operators can comply with the law effectively and without unnecessary confusion.
11. A relevant example for this submission is the instructions contained within the National Work Diary⁴ issued to truck drivers. In our opinion, these instructions are complex and difficult to understand for the majority of truck drivers who must use them. The Prosecution Authorities, NSW Police and The Regulator interpret the fatigue regulations to prescribe that a driver on standard hours may only work 12 hours in 'any 24-hour period'.
12. A work diary page is a '24-hour period.' Furthermore, the work diary instructions on page 21 provide the 'Rules for counting time' relevantly as follows; -

Rules for counting time.

The counting rules require that you always:

- *count forward from the end of a rest break, never from within a work or rest period*
- *count all periods of time (i.e. work time and rest time) in 15-minute blocks*
- *count time periods of 24 hours or longer forward from the end of a relevant major rest break relevant to the period in your hours option.*

13. On page 22, we have 'Important advice on counting 24-hour periods.

Important advice on counting 24-hour periods.

You must count work time for the whole 24-hour period following the end of a relevant major rest break. If you take another relevant major rest break during that 24-hour period, it does not reset the 24-hour period, so you do not stop counting work time for the first 24-hour period at that break. You must count all work time before, and after the second relevant major rest break you took in that 24-hour period.

³ <https://www.opc.gov.au/drafting-resources/plain-language>.

⁴ <https://www.nhvr.gov.au/files/media/document/251/202305-0704-national-driver-work-diary.pdf>

14. We say that the work diary instructions are 'soft law' – or as a Commonwealth Interdepartmental Committee dubs it, 'Grey Letter Law', to be regarded as a rule that is not legally binding force but intended to influence conduct.⁵ As such, the expression can cover multiple edicts. The work diary instructions, in our opinion, confuse rather than educate. Comparison between the 'rules' for counting time on page 21 of the Work Diary Instructions and 'important advice' for counting time on page 22, in our opinion, adds weight to the above.

15. In *Ballantyne v The National Heavy Vehicle Regulator*⁶, Peek J states: -

'Although the work diaries issued to truck drivers are not invalid, such work diaries could be more 'user friendly'. The most obvious improvement might be to expressly state, loudly and clearly, that following the end of a major rest break, there can be two overlapping 24 hour periods each of which might potentially lead to a prosecution.'

'I should add that the appellant submits that the Act itself is very long, complex and hard for ordinary people to read or understand; and also that the examples given in the log books issued to truck drivers are not as clear as they might be. I must say that he does have something of a point here, although I stress that I do not consider that the log books or the examples therein are in any way invalid. However, I do note that in both of the cases of Barnes and also Trinci, to which I have referred, the Magistrate at first instance largely agreed with the truck driver's interpretation and acquitted the truck driver, but each decision was overturned on appeal to the Supreme Court.,

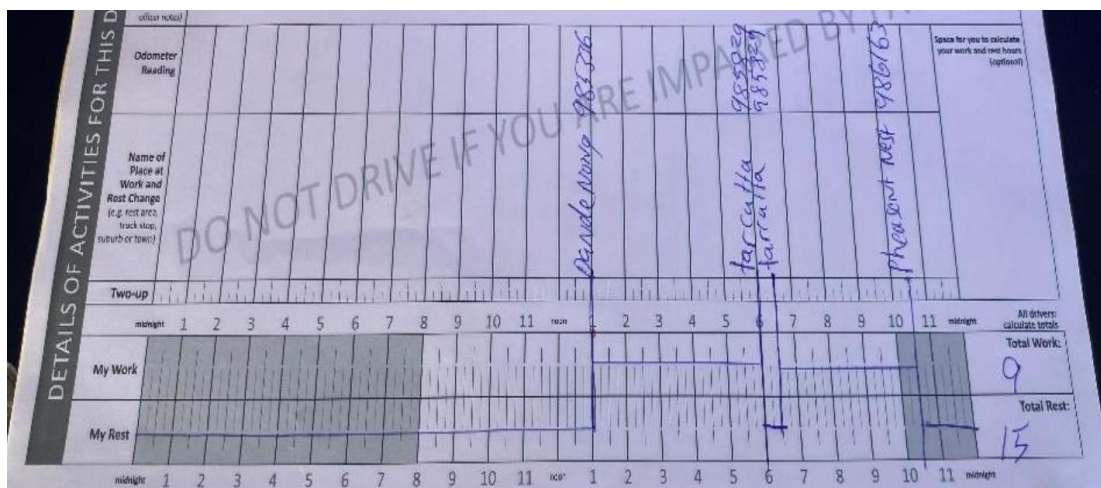
As to the examples in the log books issued to truck drivers I do consider that they could be more 'user friendly', particularly having regard to the audience to which they are addressed. It seems to me that, without in any way trying to be comprehensive, the single most obvious improvement might be to expressly state, loudly and clearly, that following the end of a major rest break there can be two overlapping 24 hour periods running at the same time. The first such period is the old 24 hour period that was running prior to the beginning of the major rest break (if it did not conclude during the course of that major rest break). The second period running would be the new 24 hour period that commences at the end of that major rest break. The trap for the driver in such circumstances is that when he commences the new 24 hour period following the major rest break he may be concentrating only on that new forthcoming 24 hour period and not appreciate fully that for some hours the old period may also still be running. The result may be in some cases that in working for the first few hours of the new 24 hour period those hours may result in his quota for the old 24 hour period being exceeded, even though he may not exceed his quota for the new 24 hour period. That is only one example that seems very apparent to me; there may well be others.

⁵ M Cini 'From Soft Law to Hard Law? Discretion and rules-making in the Commission's State Aid Regime' (2000) *Working Paper 35*, European University Institute 4; Grey-Letter Law report, ix; L Sossin & CW Smith *Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating*.

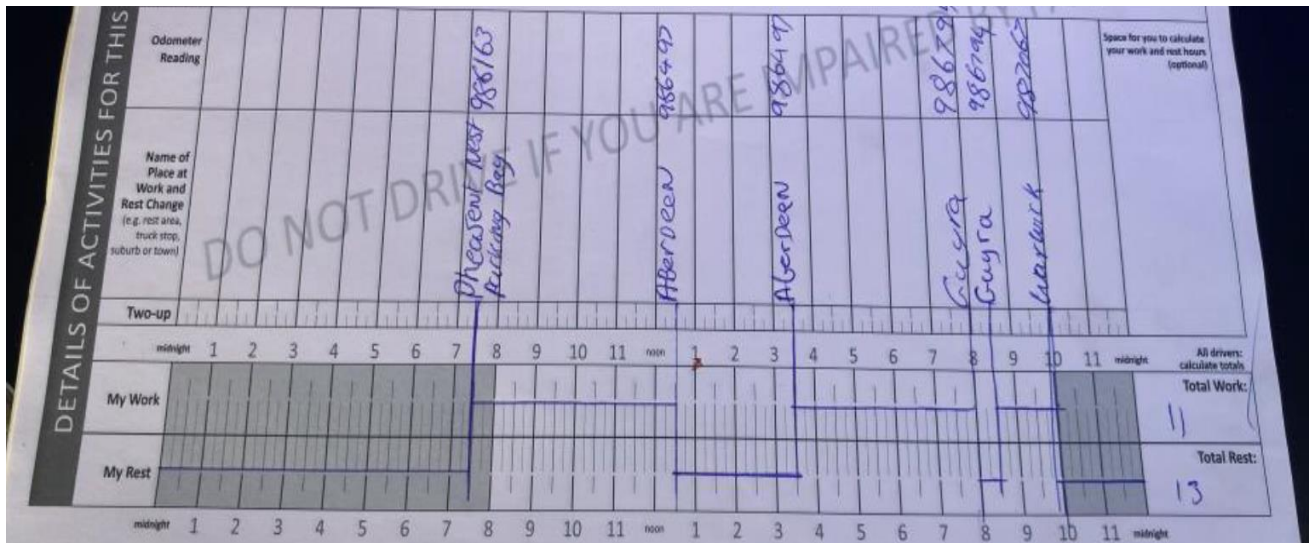
government will (2003) 40 *Alberta Law Review* 867, 871.

⁶ [2019] SASC 135 (05 August 2019).

16. To that end, the NHVR (NSW) has released the Judicial Guide 2022 to assist judicial officers and legal practitioners with an understanding of the *Heavy Vehicle National Law (HVNL)*⁷. The NHVR Director of Prosecutions, Belinda Hughes, said the updated guide is an important resource for legal practitioners who may be unfamiliar with the *HVNL*. Ms Hughes goes on to say, *'...as the NHVR extends its prosecution services into NSW, it is important that courts and lawyers understand the law the NHVR is responsible for prosecuting.'* Juxtaposed with the statement of Peek J in *Ballantyne*, Ms Hughes states, **'The HVNL can be really complex for those not familiar with it'**. (Our emphasis) The Judicial Guide 2022 is now encapsulated within the Local Court Benchbooks published by the Judicial Commission of NSW.
17. Belinda Hughes, the NHVR Director of Prosecutions, acknowledges the complexity of the HVNL and the need for courts and lawyers to comprehend it as the NHVR extends its prosecution services into NSW. This complexity, as highlighted by Ms Hughes, further underscores the requirement for greater clarity in the legislative framework governing heavy vehicle drivers.
18. Justice Peek also emphasised that the most significant improvement could involve explicitly stating that there can be two overlapping 24-hour periods following the end of a major rest break, which can potentially lead to prosecutions. The complexity lies in the driver's need to monitor both the old 24-hour period and the new one commencing at the end of the major rest break.
19. We are also aware that the NSW Branch of The Regulator has addressed NSW Magistrates in conferences, ostensibly outlining their interpretation of The Law. As a legal practice appearing throughout NSW, we have noticed a perceptible shift in Judicial attitudes towards fatigue and other HVNL offences since The Regulator commenced operations in NSW.
20. We say that 'Critical fatigue' offences are a misnomer. They are, for the most part, created by multiple major relevant rest breaks of a continuous seven hours or more. The examples below illustrate a typical circumstance that creates a 'critical fatigue' breach.



⁷ <https://www.nhvr.gov.au/files/media/document/46/202304-1316-hvnl-judicial-guide.pdf>.



21. The above examples illustrate that the driver involved had 28 hours of total rest in the two-day period in which the offence was created. Starting a relevant major rest break at 10:30 pm on the evening of the first day, the driver rested till 07:30 am the next day, a total of nine hours. Yet he was charged with a 'critical' fatigue breach. "Fatigue" is defined in section 223 of the HVNL as feeling sleepy, physically or mentally tired, weary, drowsy, exhausted, or lacking energy. There is a particular offence under s 228 HVNL of driving whilst impaired by fatigue.
22. Somewhat paradoxically, we currently have an offence in NSW that is not required to aver any evidence of actual fatigue. This offence carries the maximum penalty outlined above. The offence of driving whilst impaired by actual fatigue carries the maximum penalty that is approximately one-third of the maximum penalty available for a 'critical' fatigue breach. There are no demerit points attributed to an offence under HVNL s 228.
23. Bizarrely, the offence of not carrying or keeping a work diary at all under the HVNL s 293 carries a maximum legislated penalty of \$6000 and no demerit points upon conviction.
24. With relevance to the above, comments attributed to the NHVR CEO, Sal Prettocitto, provide some context. **"In some cases, the current fatigue laws when operators are compliant are unsafe, and when you're non-compliant, you're actually safe,"** (emphasis added) He said. "We need to shift that focus of counting hours with providing you, as an industry, the flexibility that your drivers need so they can rest when they are tired and not when you're actually safe."⁸

⁸ <<http://www.primemovermag.com.au/Petrocitto-flags-new-approach-to-risk-management-at-vta-state-conference/>>.

25. In summary, we say the Fatigue legislation and the interpretation and enforcement of such legislation have a significant impact on heavy vehicle drivers in NSW. We submit this submission has utility towards observance of regulatory obligations by heavy vehicle drivers in New South Wales.

Penalties for Over Height Vehicle Incidents

26. The prevalence of over-height vehicle incidents has invoked what we believe to be a manifestly excessive legislative approach to penalties and enforcement.

27. For example, if an over-height vehicle triggers the alarm without impacting the tunnel infrastructure, it initiates a process whereby several authorities issue extra curial penalties and sanctions. Suppose a truck driver inadvertently exceeds the maximum height for the Eastern Distributor Tunnel at Moore Park without actually coming into contact with the tunnel. In this case, the driver lowered the air suspension on the prime mover and trailer and was able to proceed through the tunnel. The penalties and sanctions applied are as follows: -

- a) NSW Police issued a penalty notice for the offence of Disobey clearance/low clearance sign tunnel/bridge etc. The fine was \$4,097, and the offence carries 12 demerit points, which amounts to a demerit point suspension for most drivers.
- b) NSW Police also issued a penalty notice for Driver heavy vehicle contravene condition of exemption. The fine was \$758, and no demerit points.
- c) TfNSW applied a discretionary suspension in accordance with clause 66(1)(d) of the *Road Transport (Driver Licensing) Regulation 2017*. The six-month suspension was applied because TfNSW believes the offence was aggravated as the breach caused an adverse effect on public amenity and obstruction to traffic, causing congestion as a result of the heavy vehicle activating network alarms on Darcy St. and Cleveland St. within the Eastern Distributor, activating closure of northbound lanes.
- d) TfNSW has also applied a six-month discretionary suspension of registration for the heavy vehicle involved in the incident.

28. As outlined, the sanctions applied are manifestly excessive, involving loss of licence and livelihood to both the driver and the responsible person for the heavy vehicle. We believe this onerous approach is applied in a 'blanket' fashion, irrespective of individual circumstances. In an article in Big Rigs⁹, dated 09 June 2023, it was stated in an emergency meeting around that date that the NSW Minister for Roads John Graham, NHVR chairman Duncan Gay and acting chief executive Ray Hassall, the NHVR has agreed to refer all overheight breaches at tunnels as "aggravated" events.
29. They further stated, "*In future all tunnel overheight incidents will be deemed aggravated no matter what the level of the breach and Transport for NSW will be able to take action against owners and operators more often.*"
30. The suspension of licence and registration applied are subject to an appeal process, albeit not in the typical fashion of such appeals. Typically, when an appeal is lodged within statutory time limits in NSW, the sanction applied is stayed until a court decides the appeal.
31. In over-height cases, the typical process does not apply, and appellants must apply to the Local Court for the stay application to be heard. This involves a typically difficult process and another layer of complexity.
32. Our ultimate submission on over-height offences is that every case and circumstance be considered applying a 'policy' decision that initiates manifestly excessive sanctions on multiple parties.

Service of Notice of Suspension

33. We note that the notice of suspension was mailed to the driver affected by such. We say this method of service invalidates the sanction sought to be applied.
34. The *Road Transport (Driver Licensing) Regulation 2017* reg 68 provides general procedural provisions for variation, suspension or cancellation of driver licences. It does not contain specific or explicit provisions for the same.
35. The *Road Transport (General) Regulation* s 154 - Service of notices on persons and delivery of things to TfNSW under driver licensing law is the contextual provision relating to service requirements. However, s 154(2) provides that a notice given for the purposes of the Road Transport (Driver Licensing) Regulation 2017, clause 69, may only be given personally.

⁹ <https://bigrigs.com.au/2023/06/09/overheight-trucks-can-now-be-taken-off-nsw-roads/>.

36. When a licence is cancelled or suspended, the authority for such a suspension or cancellation is given under the *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 69, which provides that an authorised officer may give a person notice that the person's driver licence is suspended or cancelled if the records of Transport for NSW indicate that the person's driver licence is suspended or cancelled. The clause is copied below: (2) A notice under this clause—

- (a) **must** be in an approved form, and
- (b) must identify the person to whom it is given and state that TfNSW' s records show that the person's driver licence has been suspended or cancelled, and
- (c) must state the date and time that the notice was given to the person

37. The *Uniform Civil Procedure Rules* Part 10, r 21 sets out the requirements for personal service.

10.21 How personal service effected generally

(1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.

(2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person. (3) Service in accordance with subrule (2) is taken to constitute personal service.

38. Similarly, The *Local Court Rules 2009* (NSW) reg 5.3 provides how personal service is affected generally as set out below;

1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.

(2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person. (3) Service in accordance with subrule (2) is taken to constitute personal service.

39. In *Cooper v Howard* (2012) 61 MVR 56, The Court held that the word "must" in the regulation should be construed as mandatory. It followed that because the regulation had not been complied with, the driver's license was not validly suspended.

40. Accordingly, we say the notice of suspension of licence is *void ab initio* – Void from the outset. Moreover, we say they every suspension/disqualification notice purported to be issued by any authority in NSW otherwise than by personal service suffers the same fatal defect.

Heavy Vehicle Rest Areas and Correlation with Fatigue Management and Logbook Obligations.

41. We provide a case study of relevance to several factors enshrined in the terms of reference. Our client was charged by NSW Police with 25 fatigue offences, with a cumulative maximum penalty of \$332,290 and 69 demerit points upon conviction.
42. Two of the sequences charged, subject to HVNL s 250, were minor fatigue breaches for exceeding the maximum work period in that category. HVNL s 249 Standard Hours provide the following: -
- (1) *The national regulations may prescribe the maximum work times and minimum rest times (the standard hours) applying to the driver of a fatigue-regulated heavy vehicle for a period if the driver is not operating under a BFM accreditation, AFM accreditation or work and rest hours exemption.*
- (2) *Without limiting subsection (1), the national regulations may prescribe--*
- (a) *different standard hours for solo drivers, solo drivers of fatigue-regulated buses and drivers who are a party to a two-up driving arrangement; and*
- (b) *that a solo driver of a fatigue-regulated bus may operate under either, but not both, the standard hours for solo drivers or the standard hours for solo drivers of fatigue-regulated buses; and*
- (c) *that a minor risk breach of a maximum work requirement prescribed in the regulations is not to be treated as a minor risk breach.*
- (3) A minor risk breach prescribed for the purposes of subsection (2)(c) is not a contravention of section 250 or 251.**
43. Relevantly, the *Heavy Vehicle (Fatigue Management) National Regulation* Schedule 1 provides the Standard hours and risk categories for contraventions of standard hours.
44. Schedule 1 relates to HVNL s 249(3) in that a minor risk breach of the maximum work requirement prescribed in the regulations is not to be treated as a minor risk breach. The object of the Law is to ensure that drivers take the necessary prescribed **minimum** rest breaks subject to the prescribed requirements.
45. The Tables within Schedule 1 do not specify the range of minor risk breaches pertaining to exceeding the maximum work period. In effect, a driver may work 12.75 hours without a single rest break and still only be charged with a minor risk breach for 'work more than std hour maximum time'.
46. For example, Schedule 1 provides the following:

Column 1 Total period	Column 2 Maximum work time	Column 3 Minimum rest time	Column 4 Category of breach	
Circumstance of contravention	Risk category			
In any period of a driver must not work for more than a driver must not rest for less than ...	If in that period a driver has ...	the following category of breach is committed...
5½ hours	5¼ hours work time	15 continuous minutes rest time	> 5¼ hours work time	minor risk breach
8 hours	7½ hours work time	30 minutes rest time, in blocks of at least 15 continuous minutes	> 7½ hours work time	minor risk breach
11 hours	10 hours work time	60 minutes rest time, in blocks of at least 15 continuous minutes	≤ 10¾ hours work time	minor risk breach
> 10¾ hours work time	substantial risk breach			
24 hours	12 hours work time		≤ 12¾ hours work time	minor risk breach

47. Accordingly, the purposive intent of HVNL s 249(3) is realised by the fact that a minor breach for resting less than std minimum hours is the only provision that may be realised for minor fatigue breaches.

48. It is noted that the statutory or purposive intent of HVNL s 249 is reflected in Schedule 1. The periods reflected for what may be described as a minor risk breach of a maximum work requirement have no upper limit. See the tables for 5½, 8 and 11 hours. Theoretically, according to Schedule 1, a driver may work up to 12.75 hours without a rest break and could only be charged with a minor risk breach for exceeding a maximum work requirement for that period. It is only when the risk escalates to substantial, severe, or critical are the ranges are capped so that they may be correctly particularised as contraventions of exceeding maximum standard hours.

49. Breaches of exceeding maximum work time (minor) relevant to standard hours for the period are therefore subject to HVNL 249(3). They may not be considered contraventions of HVNL s 250 or s 251.

50. For context, HVNL s 253 – **BFM Hours** provides the following; -

(1) The national regulations may prescribe the maximum work times and minimum rest times applying to the driver of a fatigue-regulated heavy vehicle for a period if the driver is operating under a BFM accreditation (the "BFM hours").

(2) Without limiting subsection (1), the national regulations may prescribe—

(a) different BFM hours for solo drivers and drivers who are a party to a two-up driving arrangement; and

(b) that a minor risk breach of a maximum work requirement prescribed in the regulations is not to be treated as a minor risk breach.

(3) A minor risk breach prescribed for the purposes of subsection (2) (b) is not a contravention of section 254 or 256.

51. With utility towards our submission, HVNL s 252 provides the defence relating to short rest breaks for drivers operating under standard hours. The relevant section is set out as follows:-

(1) This section applies if, at a particular time, the driver of a fatigue-regulated heavy vehicle is required, under section 250 or 251, to have a short rest break.

Examples of when this section applies--: The driver is required to have 15 continuous minutes rest time because--

(a) the driver has worked for 5¼ hours; or

(b) the driver has worked for 7½ hours and has only had 15 continuous minutes rest time during that period; or

(c) the driver has worked for 10 hours and has only had 3 lots of 15 continuous minutes rest time during that period.

(2) In a proceeding for an offence against section 250 or 251 relating to the driver failing to have the short rest break, it is a defence for the driver to prove that--

(a) at the time the driver was required to have the short rest break, there was no suitable rest place for fatigue-regulated heavy vehicles; and

(b) the driver had the short rest break--

(i) at the next suitable rest place for fatigue-regulated heavy vehicles available after that time on the forward route of the driver's journey; and

(ii) no later than 45 minutes after the time the driver was required to have the short rest break.

Example of when the defence applies--: The driver of a fatigue-regulated heavy vehicle fails to have a short rest break after 5¼ hours of work time because there was no suitable rest place for fatigue-regulated heavy vehicles when the driver was scheduled to have the short rest break. Instead, the driver has a short rest break after 5½ hours work at a suitable rest place for fatigue-regulated heavy vehicles down the road.

(3) In this section--

"short rest break" means rest time of less than 1 hour.

52. Our submission was put to the prosecuting authority and rejected as expected. The financial ramifications alone of admitting that these offences may not be prosecuted may need not to be explained.
53. Our client instructed that he had been unable to find a subjectively suitable rest area for a fatigue-related heavy vehicle on many occasions and that he had been unable to sleep when he was parked between other heavy vehicles with noisy icepack refrigerated air conditioner units running.
54. When addressing the Victorian Transport Association at their annual conference in 2022¹⁰, the NHVR CEO Sal Petrocitto said a new approach to risk management was currently underway in consultation with the industry. Petrocitto recognised a modern approach would be required to tackle the issues around driver hours as the current system in place had proven flawed for many road transport operators.
55. *"In some cases, the current fatigue laws when operators are compliant are unsafe and when you're non-compliant you're actually safe," he said. "We need to shift that focus of counting hours with providing you, as an industry, the flexibility that your drivers need so they can rest when they are tired and not when someone tells them to do so," said Petrocitto. "Obviously that needs to be done within those hour limits. None of you are asking for more hours. You're just asking for that flexibility within those hours."*
56. We say the fatigue laws are too prescriptive. They manage driver fatigue in a 'blanket' fashion rather than allowing drivers to manage their individual fatigue within legislated limits.
57. Our client was also subject to what we say is overcharging. Many of the offences were subsumed by each other. For example, for one 24-hour period, our client was charged with a critical fatigue breach for exceeding maximum work hours and another critical fatigue breach for exceeding minimum rest requirements. We say that one offence may not occur with the other.

¹⁰ <<https://www.australiantruckradio.com.au/petrocitto-flags-new-approach-to-risk-management-at-vta-state-conference/>>.

58. We submitted that double punishment is relevant to many sequences within the same 24-hour period. These sequences may offend the rule against duplicity. Latent duplicity (also called 'latent ambiguity' or 'latent uncertainty') occurs when a single charge alleges the commission of only one offence. Still, the evidence led by the prosecution discloses many separate offences, all of which could fit the allegation described in the charge. Whether latent or patent duplicity exists, in either case, the accused may be prejudiced in several ways.¹¹

59. Ultimately, our client was convicted and fined \$2,000 for one sequence only. All other 24 sequences were dismissed under a conditional release order. We note our client was also subject to \$4,375 in court costs and victim impact levies cumulatively upon 25 sequences. The *Fines Act* s 4 permits Revenue NSW to enforce these administrative costs and levies as if they were fines issued by The Court.

60. Whilst the case study relates to several pertinent factors, we say it has extensive utility towards one of the primary terms of reference of this inquiry, being the characteristics of the heavy vehicle industry in New South Wales that shape driver practice, in particular:-

- The availability, suitability and accessibility of, and priority locations for heavy vehicle rest areas of metropolitan Sydney, in rural and regional New South Wales.
- The suitability of heavy vehicle rest areas in terms of size, facilities, lighting, signage, and safety.
- The use of heavy vehicle rest areas of emergency stopping base for fatigue management and logbook obligations

61. The above case study illustrates, in our opinion, a general ignorance of the Law by those who prosecute it. Moreover, it demonstrates, to a certain extent, the unsuitability of modern parking bays, especially in relation to the increasing size of heavy vehicles on New South Wales roads and highways.

62. In reference to the quote by the CEO of the NHVR in paragraph 54, heavy vehicle drivers are often mandated by legislation to rest when they are not particularly tired or fatigued. Achieving sleep under those circumstances is problematic, and modern parking bays, particularly along the Pacific Highway between Brisbane and Sydney, are designed in a fashion that heavy vehicles must park within designated parking lanes.

63. This means that a driver of a heavy vehicle, trying to sleep under difficult circumstances, may have to do so whilst a noisy air-conditioning unit is running on either side of them. This is exacerbated by the lack of shadeage provided by trees, which was normally available in traditional older-style parking bays.

¹¹ *Environmental Protection Authority v Truegain Pty Ltd* at [5].

64. Accordingly, such a situation may invoke a defence available for standard-hour drivers under HVNL section 252. However, when an authorised officer or police officer inspects a driver's work diary, they are unaware or otherwise ignorant of the circumstances that have prevailed subjectively for the driver concerned.
65. We also note the prevalence of stopping bays along the Pacific Highway, which are normally situated just off the highway. In our opinion, these bays are dangerous and certainly not suitable for any sustained rest period.
66. We also believe the positioning of Safe-T-Cam surveillance cameras along NSW highways creates a situation that quite possibly increases the likelihood of heavy vehicle accidents. One such example is the Safe-T-Cam gantry situated on the Hume Highway near Bargo, south of Sydney.
67. The Hume Highway between Sydney and Melbourne is the busiest freight corridor in Australia. It is traditionally an overnight journey for most truck drivers, and drivers are aware that they are being monitored by the Safe-T-Cam network.
68. A driver travelling overnight from Melbourne to Sydney is, therefore, put in a position created by very prescriptive fatigue laws, which prevent them from having shorter fatigue breaks along the way. Drivers are then placed in the invidious position of having to drive on through the night, possibly tired, so that they may get to rest area past the last Safe-T-Cam gantry at Bargo.
69. The problem for truck drivers in NSW is that the large parking area at Pheasant's Nest is undergoing extensive renovations and is mostly unavailable for the purpose of parking large, heavy vehicles. Even when it was in full operation, most truck drivers relate that if you weren't there by midnight, you had no hope of finding a parking space suitable for a fatigue-related heavy vehicle.
70. A driver is then placed with the unenviable prospect of trying to find a suitable parking space in the metropolis of Sydney. A driver might head to the BP at Eastern Creek in the vain hope that a space may be available. Almost certainly, what's a driver arrives there, he will find any available spaces taken up by rigid vehicles using the space as a quasi-depot.
71. The driver then might try and find a street with a verge in what may be termed as an industrial area or estate. Of course, there will be no facilities such as toilets there. However, if a driver were to find a space off the roadway in an industrial estate, they would find themselves parked in what is defined as a built-up area.

72. The *Road Rules 2014* are declared to be the Road Rules for the purposes of the *Heavy Vehicle National Law* (NSW) Road Rule 200(2) provides that the driver of a heavy vehicle, a long vehicle, must not stop on a length of road in a built-up area for longer than one hour unless the driver is permitted to stop and the length of road for longer than one hour by information on or with a traffic control device, or under subrule (2A), (2A-1) or (2A-2). The maximum penalty is 20 penalty units (\$2,200), and none of the exceptions provided by the subrules would typically apply under the circumstances.
73. Local Government authorities regularly place infringement notices on fatigue-related heavy vehicles while their drivers are asleep inside them. Local Government authorities appear to be unaware of the exception provided by Road Rule 165(e), if the driver stops at a particular place, or in a particular way, to comply with another provision of these rules or a provision of another law, and the driver stops for no longer than is necessary to comply with the other provision.
74. The other provision of another law is, of course, the fatigue laws, which form part of the Law in which the Road Rules are applied towards fatigue-related heavy vehicles.
75. Another example of relevance may be when a driver of a refrigerated B-double combination leaves the Caboolture region of Queensland to deliver a load of fresh produce to the Sydney produce Markets. That driver will most probably be operating under basic fatigue management, which would allow them to work for up to 14 hours in a 24 hour period.
76. The travel time from Caboolture to the Sydney Produce markets would be approximately 12 hours, which will allow for a further two hours in which to unload and to locate a suitable rest area for fatigue-related heavy vehicles in the Sydney metropolis. Suppose a driver has three deliveries within the market area. This would involve splitting up his B-double combination to do so. Once the deliveries were complete, the driver would have to wait for his paperwork.
77. The end result of paragraphs 75 – 76 is that a driver would still be in the Sydney Produce Markets with no available work hours left in the work diary. Unfortunately, the market authority will not allow trucks to stay within the market precincts once they are unloaded. It may be argued that the market authority has a safety duty under the chain of responsibility to ensure that truck drivers are not forced to drive outside their legislated limits.
78. Notwithstanding such chain of responsibility safety duties, the market authority does not permit drivers to sleep or rest within the market precincts. Drivers must, therefore, run the gauntlet, hoping to find a suitable rest area for fatigue-related heavy vehicles within the Sydney metropolis. Authorised officers and Police often wait in ambush, like metaphorical fighter planes circling above slow-moving bombers.

79. We submit all the above has relevance to the terms of reference provided by Portfolio Committee number 6 – Transport and The Arts - Inquiry into the pressures and heavy vehicle drivers and their impact in New South Wales.

Highway Advocates Pty Ltd
24 September 2023