



Ainsley Law
Dedicated Traffic Lawyers

9 January 2020

Senator Glenn Sterle
Chair of Rural and Regional Affairs and Transport References Committee
Shadow Assistant Minister for Road Safety
Senator for Western Australia

Dear Senator,

Re: Ainsley Law submission to the Inquiry into the Importance of a viable, safe, sustainable and efficient road transport industry

We thank the Rural and Regional Affairs and Transport References Committee for the opportunity to provide a submission to the Inquiry into the Importance of a viable, safe, sustainable and efficient road transport industry (the Inquiry).

Ainsley Law is a firm based in Sydney that services the road transport industry. We specialise in representing heavy vehicle operators and drivers when they are charged under the Heavy Vehicle National Law. We also have previous experience prosecuting heavy vehicle matters for the RMS under the previous legislation.

Our work places us at the juncture between the road transport industry and the law, authorities and the courts. We see the tensions between the very important safety objectives of the HVNL and the challenges the industry faces in understanding the law and operating under it. Unfortunately, where the law does not match the industry reality the results are increased danger on roads, damage to the relationship between the industry and the RMS and good, hardworking drivers and operators choosing to leave the industry.

Our submission focusses on the driver fatigue legislation, as this topic causes the most difficulty for the drivers and operators with whom we work. Our comments relate to the operation of the HVNL in NSW, as we only practice in this is the jurisdiction.

Issue with the driver fatigue laws under HVNL

Insufficient training and education

The driver fatigue laws have many intricacies.



Many of our clients do not understand the law well. Usually they have no formal training on the driver fatigue legislation (with the exception of AFM and BFM accredited drivers). Instead they rely on:

- The **instructions contained in the front of the work diary**. This is particularly problematic for drivers with lower levels of literacy, but even as solicitors we have found these instructions hard to navigate at times.
- **Advice from other people in the industry** (e.g. other drivers, their employers etc). This is problematic as often misinformation is passed on.
- **Advice from the RMS and police**. Usually this is quick, ad hoc advice during inspections, but unfortunately not sufficient to replace thorough training.

Although several accredited training providers offer courses in how to complete work diaries, there has been virtually no uptake of this service amongst those who become our clients.

One of the main areas of misunderstanding is how to count time correctly, particularly the 24 hour period.

Under the current law, drivers must take minimum rest breaks and not exceed maximum work hours within a 24 hour period. The 24 hour period is counted from the end of each and every major rest break. Confusion arises where a driver takes a second major rest break within a 24 hour period. It is not uncommon for drivers to work a short shift and then take another 7 hour or longer rest break before starting work again. Many drivers believe that the clock is “reset” by the second long break. Often, some of the time from their second day is captured in the first 24 hour period. When this happens, they will have committed serious driver fatigue offences, but honestly believe they have worked two short days with more than the required amount of rest.

Another area that doesn’t seem to be well understood is the duty to not drive while impaired by fatigue (HVNL s 228). Most drivers we work with focus solely on the work and rest times when trying to comply with the law. Several drivers have told us that the prescribed work and rest times “make me take breaks when I’m not tired, and drive when I am”.

Only prosecuting drivers is not the most effective way to deter driver fatigue

When a fatigue offence is identified, the current manner of enforcement is to prosecute the driver. In our view, this targets the person with the least power in the relationship and the least ability to affect the systemic changes required to reduce fatigue as an industry problem.

Drivers rely on their employer/prime contractor for their livelihood and are subject to their directions. Where that person exerts pressure to breach the fatigue laws, either explicitly or through unrealistic timeframes, a driver often fears losing their employment. They are well aware that they are replaceable. The same can be said for small businesses who rely on larger businesses as their main source of work. With limited bargaining power, they can feel pressured to breach the laws or lose their main source of income.

The current focus of enforcement on drivers shields the people who are the root of systemic issues from prosecution. The incentive for those with the power to make changes is reduced. In fact, we have found that when drivers who have been prosecuted need evidence from their employers, etc, to establish their reasons



for offending or in support of their character and track record, those with the power tend to wash their hands of the situation.

If real change is to be made, the enforcement needs to target the parties with the power. Focus should be on preventing large businesses from exerting pressure on operators and should prevent operators/employers/prime-contractors from passing that pressure down to drivers.

The HVNL already has the tools to do this through the Chain of Responsibility laws. However, investigation and successfully proving those offences is more complex than proving the simple offence of “not comply with work/rest hours” against a driver.

The enforcement of the mass and dimension laws under the HVNL provides an interesting example of a policy decision to shift the focus to those who have the power to make change. In mass/dimension breach matters the default position is for the RMS to charge the operator of the vehicle, and not the driver.

By placing accountability with the operator, they are encouraged to implement policies, train their drivers and check that each job can be legally carried. Where operators have met the required standard, they are protected from liability due to a “rogue driver” who chooses to disobey company policy, by the defence of “reasonable excuse”.

Inconsistent enforcement

At times there is a lack of consistency between individual RMS and police officers in the enforcement of the driver fatigue laws, leaving drivers feeling anxious and hard done by.

We have represented a number of drivers who have had their work diaries inspected and signed off by an RMS inspector or police officer, with no offences identified. This reassures the driver that they are following the law correctly.

Subsequently they are stopped by another RMS inspector or police officer who inspects the same work diary more thoroughly. This officer identifies a mistake that the driver has made. The officer goes back through the entire work diary to find more examples of the same mistake, including on pages that have been previously examined and signed off by another officer.

When this happens, the driver receives separate charges for multiple offences, including those on the previously inspected pages. This has an element of unfairness, in that had the mistake been identified during earlier inspections the driver would have corrected their behaviour. Instead they face enormous potential fines for multiple offences committed before they had it brought to their attention and had the opportunity to remedy the situation.

Industry perception of the law and authorities

The combination of complex laws, lack of education and harsh penalties undermines the relationship between the industry and the authorities.



There is a perception amongst many in the industry that the authorities' focus is on "catching them out" and punishing them, rather than education and working with the industry to create safer roads.

There are a number of more administrative driver fatigue offences that carry significant fines, for example forgetting to tick a box or sign a work diary page. While we agree that these laws are important for ensuring the enforcement of fatigue laws, drivers feel that they are under extreme scrutiny. This is an area where the use of cautions for first time offenders and education about how to complete the diary correctly would be more conducive to ensuring compliance. This would have flow on effects for the relationship between the industry and the authorities and road safety.

Implications from the above issues

The consequences of the above issues are:

1. There is a soured perception of and relationship with the RMS. This has safety implications because, rather than the good operators working with the RMS, there is an 'us and them' mentality.
2. The HVNL's credibility is undermined. Many in the industry see it as overly complex, punitive, inconsistent and not reflecting the realities of their work. It is seen as something to fear and avoid rather than a tool to support their safety.
3. The law operates to encourage and reward counterproductive practices, such as periodically "losing" driver work diaries so that there are less pages for authorities to inspect and pick apart roadside.
4. Issues for road safety. Drivers feel that the work diary forces them to take unnecessary breaks when they are not tired, and then drive when they do feel tired. This has significant safety concerns.
5. Good people are being driven from the industry. The combination of complex laws, high scrutiny and significant fines for offences that they didn't realise they were committing, many drivers feel the risks are too high to continue working.

Recommendations

1. Education and recognition of driving as a profession: A more robust system of education would reduce the inadvertent offending by ensuring drivers understood the laws properly. This goes hand in hand with recognising truck driving as a profession that requires real skill and deserves respect.
2. Use Chain of Responsibility for fatigue offences: Holding the parties with the power in the relationship responsible for driver fatigue will force them to run their business in a way that reduces driver fatigue.
3. Consistent enforcement, with common goal of working *with* the industry to make it safer.



Again, thank you for the opportunity to provide this submission. Please don't hesitate to contact us if we can be of further assistance.

Yours sincerely,
Ainsley Law

Sarah Marinovic and Janelle Whale
Principals