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By email: codes@nhvr.gov.au

Dear Mr Petrocchio

TWU COMMENT REGARDING THE ATA/ALC-SPONSORED VOLUNTARY CODE

The TWU notes that the so-called draft Master Registered Industry Code of Practice (voluntary code) is being developed, in effect, by the Australia Trucking Association (ATA) and the Australian Logistics Council (ALC). The TWU has reviewed the proposed voluntary code and makes the following comment about it.

In summary, we note that any effort to improve safety in the transport industry, the most dangerous industry in the country, is commendable. Unfortunately, this voluntary code will not modify transport supply chain safety outcomes to anywhere near the extent that is required in our industry.

Identified deficiencies in the voluntary code have been grouped into the following categories:

1. Deficiency

The Master Code reflects the same weaknesses and deficiencies as the National Heavy Vehicle Laws (NHVLs).

Explanation

The intention of the NHVLs is to harmonise heavy vehicle laws across Australia. The object of the NHVLs is “to establish a national scheme for facilitating and regulating the use of heavy vehicles.”

The proposed voluntary code has been developed to address four obligations regulated under the HVNLs: speed compliance; fatigue management; mass, dimension and loading and vehicle safety standards.

The NHVLs do not, and were not intended to, address matters identified by the large and growing body of evidence as necessary to proactively tackle the economic factors causing carnage on our roads.ⁱ

As a consequence, the voluntary code is not equipped to address the fundamental, root cause of why the transport industry is in crisis. It is not capable of removing the economic incentives that apply supply chain and contractual pressures in the first place.

Therefore, and fundamentally, the HVNLs do not address the economics of the transport industry and nor therefore, can or does the proposed voluntary code.

As the Macquarie University study 'Regulating the Work Health Safety of Australia Road Freight Transport Drivers' (Macquarie University study) reported in January 2017, post the abolition of the Road Safety Remuneration Tribunal in 2016 there is currently "no regulatory mechanism that can eliminate existing incentives for overly tight scheduling, unpaid work, and rates that are effectively below cost recovery."ⁱⁱ

Summary

The proposed voluntary code is based on legislation that does not tackle the root cause of the crisis in our industry. This is a flawed premise that cannot not be overcome. Even if the proposed code was mandatory, the laws to which it relates do not address the fundamental source of transport industry pressures. It is therefore irrevocably flawed.

2. Deficiency

The proposed code is deficient in that it is voluntary. As well, no additional resources have been identified to enhance supply chain enforcement.

Explanation

Adherence to the voluntary code is, by definition, a matter of choice. Industry participants are free to ignore the code completely.

The proposed voluntary code states at 1.2:

"Following the Code is not mandatory, but a voluntary choice by a party in the Chain of Responsibility as one way to take responsibility for the safety and compliance of their own business."

Years of evidence has shown that voluntary regulation in road transport is not regulation at all. Indeed, history demonstrates that those companies doing the

right thing will sign up to voluntary codes as a “tick and flick” demonstration of systems already in place while companies doing the wrong thing ignore voluntary codes completely.

The National Transport Commission review in 2008 reported findings that set out:

“voluntary schemes lacked the coverage and influence to bring about overall change in safety-related work practices in the trucking industry.”ⁱⁱⁱ

The recent Macquarie University study reported that, in an industry particularly susceptible to regulatory non-compliance:

“Voluntary regulation on its own is not the solution: strong state regulation is needed.”^{iv}

In addition, the transport industry currently has an ineffective enforcement regime which the proposed voluntary code plays no role in remedying. It is a reasonable view for the TWU to take that resources diverted into developing yet another voluntary code would better have been spent on initiatives with the power to effect enforceable proactive change or, at the very least, directed towards enforcement efforts.

Summary

Parties that choose to follow the voluntary code can deviate from or withdraw their efforts at any time without penalty. Following the voluntary code is not mandatory. In addition, enforcement in the transport industry is already weak and the proposed voluntary code does nothing to improve this situation.

3. Deficiency

The voluntary code is promoted as tool that can be used as part of a defence during legal proceedings despite any requirements existing in the proposed code that would actually address the root cause of the crisis on our roads.

Explanation

The voluntary code does little more than set out obligations under the NHVLs and ways of meeting those obligations. While this, if mandatory in nature, may have had some value, it is not close to sufficient if genuinely seeking to achieve the safety improvements that the industry needs – and the voluntary nature of the code renders it close to valueless. The voluntary code is therefore rightfully open to the charge that it is no more than a tool to insulate operations against potential liability for breaches of the law.

The proposed voluntary code states at 1.2:

“While code compliance will not afford a defence as such, the contents of the Code will be a means of admitting evidence of what is known about risks and controls and would be able to be used by a court to determine what is reasonably practicable in the circumstances to which the code relates.”

This outcome can in fact adversely impact safety in the industry.

A TruckSafe Director has written that, if systems and practices are implemented that fit within the guidance contained in a voluntary code, a supply chain participant can get the “defence benefits” provided by a code. In the context of the proposed voluntary code, he has described operators using compliance accreditation schemes like TruckSafe in this way:

“Effectively, if it’s implemented properly, it will give them the ‘get out of jail free card’ that they need.”

Summary

The voluntary code does not include those elements necessary to address the root cause of safety issues in the road transport industry. Despite this, the voluntary code emphasises the protective value in terms of legal insulation able to be claimed by through code compliance. This is a double blow – a code lacking meaningful provisions which doubles as a means to assist in avoiding liability in respect of behaviour and practices that the provisions have failed to modify.

On the basis of nearly 30 years of evidence, the TWU believes that a new, mandatory, system is needed to address the root cause of the crisis on our roads. The system should require safe standards of work, including fair supply chain payments for operators and workers and safe and fair work and contractual conditions. For any system to make a proactive difference, economic and contractual supply chain pressures must be addressed.

Only a system with these attributes can begin to address the carnage that has seen 388 Australians killed in truck crashes since April 2016.

ⁱ The link between safety and methods of remuneration:

- *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, the National Transport Commission with the Honourable Lance Wright QC and Professor Michael Quinlan, October 2008:

“This Review finds that the overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices. There is solid survey evidence linking payment levels and systems to crashes, speeding, driving while fatigued and drug use. The evidence has been

accepted and indeed confirmed by Government inquiries, coronial inquests, courts and industrial tribunal hearings in Australia over a number of years. The association between remuneration and safety applies to both employed and owner drivers.”

and

“Economic factors create an incentive for truck drivers to drive fast, work long hours and use illicit substances to stay awake. These economic factors include:

- *Low rates of pay; incentive based payment methods (such as per kilometre or per trip);*
 - *Unpaid working time; and*
 - *Other factors include the hyper-competitive nature of the industry and the low bargaining power faced by drivers.*
- *National Road Freight Industry Inquiry, Report of Inquiry to the Minister for Transport, Commonwealth of Australia, (1984), Canberra;*
 - *Long Distance Truck Drivers: On road performance and economic reward, December 1991, Federal Department of Transport and Communications:*

“Any deviation from a fixed salary tends to encourage practices designed to increase economic reward which are not synergetic with reducing exposure to risk”.

and

“The Federal Department of Transport and Communications (Commonwealth) study into on-road performance and economic reward found: ‘It is the rate per se which acts to stimulate road practices in various forms in order than an acceptable level of total earnings (net of truck-related expenses) is obtained. Any deviation from a fixed salary tends to encourage practices designed to increase economic reward which are not synergetic with reducing exposure to risk.

- *Beyond the Midnight Oil, An Inquiry into the Management of Fatigue in Transport, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra:*

“Risks are compounded by the commercial imperative on transport operators to maximise the return on their investment, the demands of customers and by the pressure this places on transport workers to undertake longer hours with fewer rest breaks.”

- *Professor Michael Quinlan, Report into Safety in the Long Haul Trucking Industry, A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney:*

“Customer and consignor requirements on price, schedules and loading/unloading and freight contracts more generally, in conjunction with the atomistic and intensely competitive nature of the industry, encourage problematic tendering practices, unsustainable freight rates and dangerous work practices.”

- *R Johnstone, ‘The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement’, March 2002, National Research Centre for OHS Regulation, the ANU;*
- *C. Jones, J. Dorrian and D. Dawson, ‘Legal Implications of Fatigue in the Australian Transportation Industries’ (2003), 45 JIR 344 at 351;*
- *WorkCover Authority of NSW v Hitchcock (2005) 139 IR 439, per Walton J:*

“30 The evidence demonstrated that fatigue is a significant risk to the safety of long-haul truck drivers and to anyone on or in the vicinity of the highway. The evidence also demonstrated that the regulatory system established to avoid the risk of fatigued truck drivers was not wholly effective: the drivers who gave evidence at the trial were unanimous in their opinion that all drivers knew various ways of “beating the system”, and that this was simply a necessary part of their job. Indeed, Mr Richard O’Neill, Safe-T-Cam Co-ordinator for the RTA, agreed under cross-examination that truck drivers use various techniques to avoid Safe-T-Cam sites. The following paragraph from one of the character testimonials (written by a long-haul driver of 9 years’ experience) annexed to Mr Hitchcock’s affidavit is illustrative of the

point:

In an industry where there are poorly maintained trucks, impossible deadlines, and rampant disregard for the law, it is a pity that Jim Hitchcock will no longer be involved in the industry. [Emphasis added].

31 In the case of the Company's operations, it could be said that the regulatory system was almost wholly ineffective to avoid the risk of fatigued drivers: the Company's entire system relied upon abuse of the log-book regime. Furthermore, the evidence suggested that work practices in breach of the regulatory system were not limited to the Company.

32 Moreover, a large number of long-distance truck drivers die each year in road accidents in New South Wales - during these very proceedings, one of the witnesses (a long-haul truck driver) died in a highway accident - and a proportion of these accidents is fatigue-related."

- *R v Randall John Harm*, District Court of New South Wales, 26 August 2005, per Graham J:

"In the present matter, the statement of facts refers to safety cams and log books. Restrictions on the maximum speed of heavy vehicles have also been implemented. Despite those measures, heavy vehicle truck drivers are still placed under what is, clearly, intolerable pressure in order to get produce to the markets or goods to their destination within a time fixed, not by any rational consideration of the risks involved in too tight a timetable, but by the dictates of the marketplace. Or, to put it bluntly, sheer greed on the part of the end users of these transport services. The time has come when those who are the beneficiaries of the interstate transport industry must take some blame for what happens at the sharp end of the interstate transport industry. The drivers are put under intolerable pressure. They drive when they are too tired, and when that becomes too difficult, they take drugs to try and prolong the state of awakening, albeit with risks that it can impede their concentration and actually make things worse.

When a collision occurs, such as happened here, who ends up in the dock? Who ends up behind bars? Not the operators. Not the transport companies. Not the big corporations who are the people who use those transport services. But the driver. It's the driver who goes to gaol. The companies still make the profits. The drivers become another casualty of the heavy transport industry. Their lives are ruined, in many ways just as badly as many of the victims' lives are ruined, by the imperative greed which lies at the heart of the interstate transport industry. Case after case in the Courts demonstrates the inadequacy of the government's response to these problems and the inadequacy of the transport industry's own response to these problems."

- NSW Deputy Coroner Dorelle Pinch expressed the consequences of this heightened 'exposure to risk' in her 2005 findings regarding the tragic deaths of a number of employee drivers Anthony Forsythe, Barry Supple and Timothy John Walsh. The Deputy Coroner highlighted the impact of inadequate rates:

"As long as driver payments are based on a (low) rate per kilometre there will always be an incentive for drivers to maximise the hours they drive, not because they are greedy but simply to earn a decent wage."

- In *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328, the Full Bench of the Industrial Relations Commission of NSW said:

"We consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/ or rates of pay and safety outcomes";

The Full Bench also noted that the following are characteristic of the heavy transport industry:

"(a) there is widespread non-compliance with award and contract determination provisions and, in particular, underpayment of wages (a view supported by the Executive Director of the NSW Road Transport Association, Martin Iffland);

(b) it is not uncommon for transport companies, which themselves would not engage in conduct in breach of industrial instruments, to subcontract work of marginal viability to other transport companies, which are prepared to breach industrial instruments in order to make a profit;

(c) labour costs are the most significant component of transportation costs and there is an inherent incentive to achieve savings through non-compliance with industrial instruments or

through the engagement of owner drivers or small fleet owners who are prepared to "do what it takes" to make the work profitable;

(d) the competitive pressures in the long distance sector have resulted in a situation where the major transport operators perform only a fraction of the work in the industry with the rest being contracted out;

(e) most companies performing long distance work resist enterprise bargaining because of the likelihood that an enterprise bargaining arrangement will price them out of the market by requiring the payment of labour costs measured against yardsticks other than that of financial viability;

(f) there is a link between remuneration and safety issues such as excessive hours of work;

(g) commercial pressures, most notably from major retailers, have intensified, resulting in the major transport companies tendering for contracts at very low rates and leading to the result that they subcontract out any work that they cannot perform profitably. Commercial pressure is also exercised by major retailers in the form of directed delivery schedules placing stress and, at times, unrealistic expectations on the driver actually performing the work;

(h) major retailers refuse to take responsibility for the consequences of the time restrictions that their delivery systems impose on subcontractors and major transport operators themselves contract out responsibility for the work and yet resist being called to account when things go wrong further down the chain;

(i) the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive step; and

j) those higher up the chain often contract out work for the express reason of transferring responsibility for the safe performance of the work to others.

Andrew Villis, former driver, gave the following evidence to the NSW Industrial Relations Commission in that case:

"When I was required to perform excessive hours I would sometimes experience a state of mind that I can only describe as hallucinations, which I considered to be due to sleep deprivation. I would 'see' trees turning into machinery, which would lift my truck off the road. I 'saw' myself run over motorcycles, cars and people. On one occasion I held up the highway in Grafton while waiting for a truck which was not there to do a three point turn (I was radioed by drivers behind me asking why I had stopped). I estimate that I had experiences like these roughly every second day. They were not an uncommon thing for me."

Professor Michael Belzer gave the following evidence before the NSW Industrial Relations Commission in that case:

"Higher pay produces superior safety performance for firms and drivers. The precise driver-level study of Hunt suggests this relationship may be as high as 1:4"

and

"Every 10% more that drivers earn in pay rate is associated with an 18.7% lower probability of crash, and for every 10% more paid days off the probability of driver crashes declines 6.3%".

Officers of the NSW Road Transport Association gave the following evidence in that case:

Q: Can I give an example? If a company operates a payment system which rewards drivers not by time worked, but for the completion of the trip and that system doesn't adequately remunerate the driver for the time worked, that might lead to a result where the driver simply tries to complete the work as quickly as he or she can in order to maximise their income. Is that right?

A: That's right, I agree with that.

- 'Pay Incentives and Truck Driver Safety: A Case Study' (January 2006), *Industrial and Labor Relations Review* (59. Ind. & Lab. Rel. Rev. 205):

"The pay increase influenced safety by modifying the behaviour of current drivers. The data indicate that drivers had better crash records after the pay increase, when the analysis controls for demographic, occupational and human capital characteristics."

- Rodriguez, DA, Targa, F & Belzer MH, 'Pay Incentives and Truck Driver Safety: A Case Study', *Industrial and Labour Relations Review*, Vol 59, No. 2, January 2006:

“A 1% increase in pay rates from median level leads to a 1.33% decrease in crash risk, for those drivers currently receiving the industry median award. Extrapolation of the U-shape “pay incentive to truck driver safety” suggests increasing pay 10% to the median level can approximately reduce crash probability by around 20%.”

- Professor Michael Belzer, statement in the National Transport Commission Report - *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, 2008:

“The point estimates indicate that if mileage rate were to increase to \$0.37 a mile, drivers would reduce their weekly hours to be in compliance with current regulations. At this rate, drivers are being compensated at a rate sufficient for them to be able to satisfy their income requirements without being induced to work in excess of mandated law.

- Professor Michael Belzer, excerpt from ‘*The Economics of Safety: How Compensation Affects Commercial Motor Vehicle Driver Safety*’, 2011:

“Higher driver pay is associated with safer operations. Clearly the more drivers are paid, and the more they are paid for their non-driving time, the less likely they are to have crashes ... if the fundamental exigencies of markets work at all, then cargo owners’ need for lower price will lead to a race to the bottom and safety will suffer. Because economic forces are involved, economic solutions must be considered.”

- Dr Angela Wallace, Professor Jeremy Davey and Mr Jason Edwards, Centre for Accident Research and Road Safety – Qld, Queensland University of Technology, ‘*Safety Culture in Supply Chains: Customer is King*’, 2012;
- Ann Williamson and Rena Friswell, ‘The effect of external non-driving factors, payment type and waiting and queuing on fatigue in long distance trucking’ (2013), *Accident Analysis Prevention* (58), 26-34;
- A/Prof. Louise Thornwaite and Dr Sharon O’Neill, ‘*Evaluating Approaches to Regulating WHS in the Australian Road Freight Transport Industry*’ (2016), Final Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO).

ⁱⁱ Thornthwaite, L. and O’Neill, S., ‘Evaluation Approaches to Regulating WHS in the Australia Road Freight Transport Industry’ (2016), p.16.

ⁱⁱⁱ Wright, L. and Quinlan M., ‘Remuneration & Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission,’ The National Transport Commission, 2008, p.48.

^{iv} Thornthwaite, L. and O’Neill, S., ‘Evaluation Approaches to Regulating WHS in the Australia Road Freight Transport Industry’ (2016), p.18.