

4 General comments

The Victorian Automotive Chamber of Commerce (VACC) welcomes the opportunity to provide a submission on the Draft Code of Practice on Managing Fatigue Risks at Work (the Draft Code). VACC supports initiatives that genuinely improve workplace health and safety outcomes in Australian automotive workplaces. Accordingly, VACC is strongly supportive of initiatives that will, in practice, assist duty holders to achieve compliance with the health and safety duties under applicable health and safety legislation.

However, VACC is concerned that the Draft Code is not fit-for-purpose in its current form as it does not provide adequate practical guidance to PCBU, workers and other duty holders on how to manage fatigue-related risks in the workplace. VACC also considers the Draft Code to be a significant departure from Safe Work Australia's November 2013 Guide for Managing the Risk of Fatigue at Work (2013 Guidance), in terms of accessibility, practicality and utility.

Notably, in addition to being more than twice the length of the 2013 Guidance, the Draft Code appears to infer that the responsibility for fatigue, including in relation to a worker's fitness for work, is solely that of the PCBU – with references to worker duties seemingly added as an afterthought. This may be contrasted with the more balanced approach taken in the 2013 Guidance, where the responsibility of all duty holders under the WHS Act – including PCBUs (section 19), officers (section 27) and workers (section 28) – is prioritised (and outlined in Table 1, pp 3-4). Consistent with the 2013 Guidance, VACC strongly believes that everyone in the workplace has a work health and safety duty and can help to ensure fatigue does not create a risk to health and safety at work. This should be better reflected in the Draft Code.

Recommendation 1: The Draft Code should be amended to more clearly reflect all duty holder responsibilities in ensuring fatigue does not create a risk to health and safety at work.

VACC is also concerned with the manner in which the extensive list of fatigue hazards has been framed in the Draft Code, noting that they appear too simplified and generalised to be of practical benefit to the vast majority of PCBUs. More concerningly, a number of the examples appear pre-occupied with industrial relations-related matters and cover a range of 'hazards' that are not directly related to fatigue of themselves. This is particularly concerning as the Draft Code fails to adequately acknowledge that there is no singular optimal solution for managing fatigue, given the diversity of work and workplaces.

VACC notes that whilst covering similar subject matter as the 2013 Guidance with respect to 'shift systems', the Draft Code introduces the minimisation of irregular hours as a common principle to be applied in designing shifts to minimise fatigue (p 25) – stating, without evidentiary justification, that "minimising irregular hours reduces the risks of workers becoming fatigued" (p 26). Such bald assertions are unhelpful in a proposed Code of Practice,

particularly when accompanied by such tenuously linked examples as: “setting rosters early to ensure workers can plan personal time...” (p 26), or “providing workers with more control over their shifts to allow for personal responsibilities and leisure time” (p 26).

VACC is opposed to the deliberate conflation of industrial relations and WHS matters as it invariably leads to unnecessary ambiguity, confusion and disputation. In the context of the Draft Code (and as evidenced above) the inherent problem of conflating these issues may be viewed as resulting in an overly expansive approach to risk/hazard identification that firstly, adversely impact the credibility of the Draft Code and the seriousness of fatigue as a WHS issue; and secondly, goes beyond what is reasonably practicable and/or within the control of PCBU. VACC notes that examples that may be considered emblematic of such concerns including the following:

- “working beyond 39 hours per week has been shown to lead to a decline in mental and physical health” (p 7)
- “eligible employees also have the right to refuse employer or third-party contact outside of working hours under industrial relations laws” (pp 27-28)
- “have free weekends at least every three weeks” (p 27)
- “schedule hard or complex tasks early in the shift and avoid these tasks when energy and concentration may be low (e.g. ... post lunch 2-4:30pm)” (p 28)
- managing worker intake of stimulants such as coffee, tea and soft drinks (p 30)
- napping at work as a control measure (p 31)

Accordingly, in addition to implementation of the aforementioned recommendation/s, the Draft Code would benefit significantly by reframing fatigue risks/hazards in purely WHS terms and providing guidance aimed at the duty holders who hold the relevant duty. As a result, material that is primarily focussed on ensuring workers present to work in a fit (non-fatigued) state (e.g. good nutrition, enough sleep, etc) must be primarily framed at the worker, rather than the PCBU. PCBUs cannot be expected to eliminate or reduce the risks over which they have absolutely no control – their workers’ lives. Fitness for work is a legitimate and real concern for which PCBUs, despite workplace policies that may be in place, have limited or zero control.

Recommendation 2: The Draft Code should be amended to remove references to risks and/or hazards that are not inherently WHS-related in nature.

Recommendation 3: The Draft Code should be amended to identify WHS-related fatigue hazards with sufficient contextual specificity to be of practical benefit, whilst acknowledging that there is no ‘one size fits all’ approach to managing fatigue in the workplace.

Recommendation 4: The Draft Code should be amended to ensure that reasonably practicable solutions to identified WHS-related fatigue risks are provided to the relevant duty holder/s (e.g. workers in relation to fitness from work).

Consistent with the above, VACC is also concerned by the limited guidance provided in the Draft Code to PCBUs (and other duty holders) relating to practical fatigue risk control ‘solutions’ to the seeming pervasiveness of the ‘problems’ identified. Further, where solution-focussed guidance has been provided in the Draft Code, it may reasonably be characterised as largely aspirational, rather than practical, in nature for the vast majority of PCBUs. For small business operators in particular (who make up the vast majority of PCBUs), there is little in the way of specific guidance that may be considered ‘reasonably practicable’.

This concern is perhaps best illustrated by the Draft Code’s suggestion that PCBUs can eliminate or minimise both the health and the safety risks from fatigue through shift design “...supported by scheduling software, such as technology leveraging bio-mathematical models.” (p 25). The vast majority of PCBUs would struggle to understand what the above even means, let alone how they could potentially implement such measures in their workplace. It is therefore important that the Draft Code acknowledges that small businesses are not simply ‘little big businesses’ – they are qualitatively different – when proffering solutions.

Recommendation 5: The Draft Code should be amended to reflect what is reasonably practicable for the vast majority of PCBUs that are small business operators.

Whilst adoption of the aforementioned recommendations would improve the Draft Code, VACC remains concerned that by its very nature, a Code of Practice is not the appropriate means for managing WHS issues that are as heterogenous as fatigue in the workplace. Rather, duty holders are best assisted through access to practical industry (and workplace size) specific guidance material that is more tailored to the specific circumstances of their workplace – and thus, better able to provide actionable steps to manage and reduce fatigue to achieve safer workplace outcomes. This should include a particular focus on those industries that may be considered most at risk, including for example, hospital environments – as well as small businesses more generally. As such, VACC does not support the development and release of the Draft Code as a Code of Practice.

Recommendation 6: Replace Draft Code with fit-for-purpose fatigue guidance material, tailored to the specific needs of the workplace.

5 Comments on specific sections

You can comment on as few or as many specific sections as you like.

1. Introduction

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1.1 What is fatigue?

VACC does not support the expansion of the concept of fatigue to include ‘emotional fatigue’ as a separate and distinct form of fatigue from mental and/or physical fatigue. The concept of ‘emotional fatigue’, like other concepts referenced in the Latrobe University ‘Rapid Review’ document (e.g. ‘visual fatigue’ and ‘compassion fatigue’) are best understood as subsets of mental and/or physical fatigue – rather than separate categories.

More broadly, VACC questions the relevance of the Rapid Review to a consideration of the Draft Code, given its research limitations – evidenced by its overreliance on countries with significantly different working arrangements (i.e. USA and Iran) and overreliance on the healthcare industry.

The existing definition of fatigue (used in the 2013 Guidance) should be retained – which in VACC’s view remains a more fit-for-purpose document for PCBUs and other duty holders, both in terms of substance and style.

1.2 How fatigue causes harm

The broader health, safety and wellbeing section does not get to the point of individual lifestyle choices which must be expanded. This section focuses on how fatigue can impact and harm a worker directly.

PCBUs cannot be expected to eliminate or reduce the risks over which they have absolutely no control – their employees’ lives of which this is the inference throughout this document and particularly in this section.

These are health conditions which remain in the majority of cases unrelated to work. The section is truly unbalanced and if it is to be retained, must be reframed to focus on assisting worker to meet their duties – i.e. how a worker can ensure they are getting sufficient rest to be able to perform their work duties in a manner that is not impacted by fatigue.

Workers have a duty and non- work related or associated issues are extremely important and impact a workplace.

- *not getting enough sleep*
- *No quality sleep*
- *Balanced diet*
- *Hydration*
- *Burning the midnight oil*
- *Illness*
- *Lifestyle choices such as drugs and alcohol*
- *Domestic circumstances*

The management of shiftwork is a topic that is covered and managed in various industries, sweeping statements that “shiftwork, long hours and night shift is associated with poorer general wellbeing.....” are generalised and unhelpful and has no place in this document. Equally, speculative comments that infer that working beyond 39 hours per week causes a decline in the mental and physical health of workers are reckless and undermine the credibility of the draft Code. They should be removed.

1.3 WHS duties to manage fatigue risks

Unlike the current guidance, this section only references the PCBU and their duty under section 19, falsely implying that PCBUs are the sole duty holder when it comes to managing fatigue risks. The important role of other duty holders, including both officers (section 27) and workers (section 28) needs to be inserted here – as per the current 2013 Guidance.

As this section also illustrates, the Draft Code appears to be preoccupied with overreaching, including into IR-related matters – of which it has neither jurisdiction nor expertise. The issue regarding ‘at work’ appears to be an attempt to bolster recent ‘right to disconnect changes’ and appears to pay no regard to how such working arrangements operate in practice. This lack of understanding is illustrated by the example of “the risks to students of excessive workloads”, which is of unclear purpose and relevance. Such IR-related commentary should be removed.

To the extent that it is retained, the section should outline mental fatigue risks and physical fatigue risks. Examples of the former, may include psychological hazards and the latter hazardous manual tasks – and include more helpful examples than what is currently provided (e.g. “incivility”). The section on inter-relation could then better articulate the way in which fatigue can impact psychological and physical hazards.

2. Risk management process

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2.1 Leadership and management commitment

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2.2 Consulting throughout the risk management process

This should also include a reference to worker duties, including those who are not Officers but who are involved in management/supervision – as well as broad duty of workers.

A consultative and cooperative approach to WHS in the workplace requires all duty holders to understand their responsibilities.

3. Identify hazards

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3.1 Risk of workers becoming fatigued

The list of examples says it is not exhaustive however that is an extremely large list. Preventing fatigue may not always be reasonably practicable and this is extremely important to preface within the beginning of the document due to hazards outside of the PCBU's control. Whilst this is specified in section 5.3 managing health and safety risks from fatigue (p 30), it should however be stated in this early section of the document.

p 15 – first para

The sentence should also provide “The implementation of appropriate control measures would be required to minimise the risk to health and safety”.

The examples should all be fully reviewed or even deleted. They are negative and, in many cases, extremely unhelpful as a solution or guidance is not provided. Further in many cases, they are not of themselves, a fatigue hazard – and are IR matters. It is important that a Code of Practice does not become concerned with furthering an industrial relations agenda under the guise of WHS.

Long Hours

- The term ‘long hours’ is not defined, although it is noted that maximum shift hours are generally prescribed in modern awards/ enterprise agreements.*
- On call work in addition to regular shifts, presupposes that the regular shifts are lengthy in nature and/or that the employee actually is ‘called’ to perform lengthy work.*

Irregular hours

- Again, the same example above re on call work is provided.*
- Working irregular hours of itself is not a fatigue hazard. Rotating shifts may be a fatigue risk if it is a night shift if the employee has difficulty in adjusting their sleep pattern. Slow rotations between day and afternoon shifts for example, are a poor example.*
- Working remotely for blocks of time are not of itself a fatigue hazard.*
- Less than 24 hours’ notice is given before shifts is not of itself a fatigue hazard.*
- Shift start or finish times changed at short notice are again, not of itself a fatigue hazard.*
- Frequent unplanned overtime is again, not of itself, a fatigue hazard.*

p 16 –

Insufficient breaks during work

- ‘not having at least two consecutive night sleep between shift blocks’ – is not always attributable to the employer management of rosters etc. it may be completely out of the employers control*

Insufficient breaks between periods of work

- ‘Workers don’t have opportunities to use leave entitlements’ – this is inflammatory – delete example*

High physical job demands

- *'prolonged sedentary work' – within the section of 'high physical job demands but a positive outlook such as 'breaking up sedentary time would be beneficial' or consideration of health promotion initiatives is more appropriate*

p 17 –

High or low cognitive job demands

- *'Complex tasks or work that exceeds worker's 'capacity and competency' – assumes again that the employer is to blame for this point – how about again a positive outline of training*

Exposure to psychosocial hazards

- *'varying task intensity', repetitive tasks are in many cases unavoidable and should not be included in this section with more information should be provided.*

p 18 –

Sleep opportunity

- *Second jobs, extended commutes between work and home – both out of control of the employer in most cases and should be qualified.*

There is such a negative spin with all the examples and proves that this should be limited to a guidance document in order to provide examples of how each could be improved. 'lack of tools and resources to perform work' could be re-worded to 'appropriate tools and resources required to perform the work'.

3.2 Health and safety risk from fatigue

VACC has a number of concerns with this section. How does a PCBU manage the fatigue of workers who come to work fatigued already? This is something the PCBU who has little or no control over. How does a PCBU measure fatigue before the work has even started?

"sometimes workers may arrive to work already fatigued and safety systems should account for some fatigue" should be deleted, it is a completely unacceptable statement.

Such loose and unqualified commentary (similar to that found in subsequent section (p 31) re "workplace napping") suggests that such conduct should be condoned (if not encouraged), rather than being grounds for disciplinary action in the vast majority of workplaces. Remove.

Consideration for small business would be advantageous. The vast majority of Australian PCBUs are small business operators. They are not 'little big business' and do not have the degree of sophistication assumed in this section. A reference that would assist small business, appropriate to their resources and level of sophistication, should be drafted in this section as they do not have the advanced systems for monitoring reviewing and analysing data.

It is unclear what purpose burnout section provides – if retained, it should be more purposeful in relation to the specific issue of fatigue.

3.3 How to identify fatigue-related hazards

p 21 –

Review available records and data analysis

Much of this section is unhelpful. The suggestion that the majority of PCBUs will have all of the suggested records and data available in aggregated form that allows it to be analysed in its totality at the business owner's fingertips is aspirational – and setting PCBUs up to fail.

Further, performance agreements, leave usage and absenteeism and turnover data are very poor indicators of fatigue of themselves – as are industrial relations grievances regarding hours of work or otherwise. The conflation of WHS and IR issues should not be encouraged.

Seek information from reliable sources.

The Draft Code suggests that other material can be sourced from industry associations, unions and regulators. Given its current focus on PCBUs, it is unclear why unions (as representatives of employees) have been promoted as a reliable source of information and advice. It also suggests that it can be helpful in high complex or high-risk situations. The Draft Code provides another layer of complexity for industries who have systems in place and adds no extra value than a Guidance document for workplaces who require practical guidance to assist them to make changes in reducing fatigue.

p 22 –

The suggestion that the PCBU is required to install equipment to monitor fatigue (e.g. in-vehicle eye-monitoring and reporting mechanisms) if workers are driving long distances is problematic and should be removed. In addition to reasonably practicable considerations, such initiatives often raise privacy concerns and are often actively contested by workers (and unions).

4. Assess the risks

4.1 When should you assess the risks?

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4.2 How to assess the risks

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5. Control the risks

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5.1 Combination of control measures

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5.2 Preventing fatigue

This section repeats the previously discussed misleading and ill-informed information, that both conflates IR issues with genuine WHS concerns and fails to provide practical guidance for the vast majority of PCBU's who are operating small businesses.

p 25 –

Small business operators should not be expected to utilise “technology leveraging bio-mathematical models”. More practical examples should be provided.

p 26 –

Worker agreement to work so-called ‘high risk’ shifts – this section should be removed. If it is to be retained, it should be reframed to focus on a worker’s responsibility not to come to work fatigued, whether for “social reasons” or any other – and that WHS duties are a separate consideration to IR requirements, such as award provisions.

Example

Minimise long hours

The restriction of shift is not always possible. The previous page assists with outlining scheduling software and technology which may be more appropriate in this section, in addition to measures more applicable to small business operators. VACC does not accept the contention that 8 hours should be a maximum working period. This appears arbitrary and based on IR-related conventions, rather than objective WHS-related grounds. It is also impractical for a number of workplaces, unnecessarily restricting working arrangement flexibility for PCBU's and workers alike.

Minimise irregular hours

Minimising irregular hours, does not in itself, reduce the risks of workers becoming fatigued. The statement should therefore be deleted as misleading. Further, the examples provided are primarily industrial in nature – and deal with issues of inconvenience (and potential industrial demands for penalty rates), with reference to sleep seemingly added to try to justify relevance to the Draft Code.

pp 26-27 –

Minimise circadian disruption

Whilst the examples for minimising circadian disruption may be helpful what would be most helpful would be to link the negative and non-exhaustive list in Section 3.1 by providing a link to practical solutions.

Further, it should be noted that there is a well-established body of research supporting the view that workers on permanent night shift adapt their sleeping pattern accordingly, so that they are less fatigued than someone who is on a rotating roster. The suggestion of limiting night shifts to no more than three successive night shifts should be deleted.

Provide sufficient breaks whilst at work

Modern awards provide for breaks, including crib breaks when employees are required to work longer overtime hours. Care should be taken not to unnecessarily override these conditions, which have been put in place to reflect the specifics of the industry through arbitration involving relevant industry parties (i.e. employer groups and unions) with detailed knowledge of industry conditions. Accordingly, the over-simplified and over-generalised statements regarding the taking of breaks should be reconsidered as they do not provide reliable and practical guidance.

Schedule sufficient breaks between periods of work

As above, over-simplified and over-generalised statements are not helpful and should be removed. For example, the statement that workers should not work more than 5 days in a row, does not take into consideration, working arrangements for casual and part time employees who may work 4 hours per day. The statement that such employees should be prevented from working more than 5 days in a row due to fatigue risk is simply wrong. As is the suggestion that such employees need to have at least one full day off per week.

Similarly, the statement that workers should have weekends free at least every 3 weeks is lifestyle, rather than fatigue, related – and shows a concerning lack of understanding as to how many industries and workplaces safely operate. This lack of understanding is further illustrated by its commentary regarding award covered matters such as right to disconnect and minimum breaks between work. Such a preoccupation with industrial relations matters undermines the legitimacy of the Draft Code.

Task, equipment and environment

p 28 –

As above, over-simplified and over-generalised statements are not helpful and should be removed. For example, the statement that PCBUs should not schedule hard or complex tasks after lunch is particularly concerning – as is the suggestion that, in the middle of a skills crisis, that the majority of employers can simply click their fingers and call-in additional worker/s is unrealistic (and would seemingly create a new fatigue risk if working irregular hours).

Additionally, whilst common sense advice, access to healthy food and observance of good sleep habits are more appropriately framed as relating to duties of workers, rather than PCBUs.

p 29 –

Managing risks for individual workers

The example requires clarification, work related injury? A workplace may not be able to accommodate any adjustment for a non-work-related injury for example.

5.3 Managing health and safety risks from fatigue

p 30 –

Stimulants

The suggestion that PCBUs are relying on workers drinking tea, coffee, etc as control measures for fatigue is completely misguided. In practice, PCBUs don't direct workers to consume tea, coffee, etc – the consumption of such beverages is generally well outside the control of the PCBU. Again, this information is more appropriately framed as information for workers regarding and inappropriate use and their responsibilities.

p 31 –

Napping at work.

As above, over-simplified and over-generalised statements about the benefits of napping at work are not helpful and should be removed. In the vast majority of workplaces, such conduct is not encouraged but is rather grounds for disciplinary action.

Have systems in place to prevent workers making fatigue-related errors

As above, these over-simplified and over-generalised examples are poor and are, at best, indirectly related to fatigue prevention. For example, what does training newer or inexperienced workers and supervising them while they gain experience relate specifically/directly to fatigue management?

p 32 –

Have systems in place to protect workers and others from the consequences of fatigue-related errors

As above, whilst such measures may be relevant in specific circumstances, the bald statement that systems should be introduced to double check for mistakes (i.e. duplication of work) is unhelpful.

Incident response

Last paragraph – delete example

“If a worker is seriously injured in a car accident on the way home from night shift that occurred due to work-related fatigue”

The inference that a PCBU can automatically determine that a car accident involving a worker after a night shift has been caused by work-related fatigue is incorrect and should be removed.

5.4 Fatigue duties shared with workers

This whole section should be moved to the front of the document and expanded. The risk of fatigued workers who come to work fatigued, have multiple jobs, have health issues etc is real and should not be taken lightly. Workers have a very important shared duty that should not be placed at the back of the document. It is perhaps emblematic of our concerns with the Draft Code that the first mention of the risk of fatigue being a shared duty between the PCBU and workers is at the bottom of p 32 – with all of three paragraphs (less than half a page) dedicated to ‘worker duties’.

p 33 –

Contrary to what is inferred, WHS policies (and procedures) are often stand-alone documents that are not formally incorporated into employment contracts. Such WHS policies and procedures, whilst complementing employment contracts, travel arrangements, project schedules and IT systems, typically contain their own reporting/issue resolution procedure.

WHS policies/procedures can include extra information about not coming into work with no sleep, under the influence of alcohol and drugs etc. This section is extremely light on and although each workplace may have a fitness for work policy, more needs to be included here.

In addition, this section needs to refrain from providing IR/employment law advice, including in relation to second job policies – noting that the statement regarding not limiting workers to working less than the ‘standard full-time hours’ is at odds with the advice provided earlier in the proposed Code regarding ‘long hours’ and ‘irregular hours’. Similarly, the statement advising PCBUs to “be respectful of workers privacy”, whilst advocating measures elsewhere in the Draft Code that require a state of knowledge of the worker’s private life, serve to highlight our concerns.

5.5 Other persons

5.6 Implementing control measures

Workplace Policies

p 36 –

As noted above, WHS policies (and procedures) are typically stand-alone documents. The statement that they are not stand-alone and need to be reflected in other places such as employment contracts is misleading – and serves to unnecessarily conflate IR and WHS issues. Other working arrangements (including employment contracts) must complement WHS policies and procedures, rather than duplicate/incorporate them. It is an important distinction that should be reflected in the Draft Code to avoid confusion.

6. Maintain and review control measures

p 37 –

Paragraph 4 – “Reports, complaints (including informal complaints).....”

The second part of this paragraph should be deleted. Any issues if they are not raised in the health and safety context is inappropriate. A grievance regarding hours of work must have a WHS connection. It is inappropriate to even suggest that this would be acceptable. Paves

the way for Industrial Relations issues to make their way into the management WHS related issues.

7. Record keeping

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Appendix A – Resources

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Appendix B – Risk management chart

This section should be updated to reflect commentary provided above (re hazards) so that it may be provide more appropriate risk indicators and control measures.

Appendix C – Case Studies

As above. The case studies should be updated to reflect the commentary above so they can provide more practical, fatigue-specific guidance for PCBUs.