

Enforceable Undertaking

Incident Date: May 2019

Party in the CoR: Prime Contractor

Offence: Breach of 26D Duty of executive of legal entity

Background

In May 2019, a fatal single vehicle crash occurred in Queensland. The heavy vehicle combination was a 3 axle Mack Trident tipper towing a 4 axle Maxi Trans dog trailer. Whilst climbing a gradient of between 12.1% and 17%, the heavy vehicle combination came to a stop and rolled backwards. The trailer dropped off the edge of the roadway on a steep decline of 45%. This resulted in the heavy vehicle combination being violently rotated around on the down slope prior to being pulled over the road edge. The heavy vehicle combination landed upside down causing fatal injuries to the driver.



Investigation

The NHVR commenced an investigation into the compliance with the Primary Duty (26C) under the Heavy Vehicle National Law (HVNL) at the request of the Queensland Police Service (QPS). The investigation revealed:

The company and its director(s) failed to ensure a driver of a fatigue-regulated heavy vehicle did not drive while affected by fatigue, by reason of:

- No fatigue management system in place;

- No requests for driving records enabling the defendant(s) to ensure drivers are compliant with fatigue regulations;
- Inadequate information, training, instruction and supervision of fatigue management obligations;
- Failure to obtain the necessary information and knowledge to control or mitigate the risk of fatigue;
- Failure to implement any fatigue management policies or procedures relevant to the transport operators; and
- Inadequate monitoring and/or due diligence by all parties to ensure safety and compliance of transport activities involving heavy vehicles.

The company and its director(s) failed to ensure fatigue-regulated heavy vehicles are safe, roadworthy, properly maintained and complied with the relevant vehicle standards, by reason of:

Reasonably Practicable

1. Drivers of fatigue-regulated heavy vehicles may drive while impaired by fatigue (hazard)

- The risk created by this hazard is a risk of serious injuries or fatalities to the driver and other road users, damage to road infrastructure and damage to the environment.

This risk can be minimised or eliminated by ensuring:

- Adequate fatigue management policies and procedures to manage the fatigue of drivers; and
- Adequate instructions and training by qualified personnel in policies and procedures of the company, relative to driver fatigue, and relevant legislation under the Heavy Vehicle National Law (HVNL), is delivered to drivers; and
- Accurate records of employee training and induction records are kept and regularly audited to ensure training has been undertaken
- by all employees and identifies any gaps in training, relating to fatigue management; and
- Adequate systems and controls are utilised to ensure driver records, as required under Section 319 of the HVNL, are accounted for and reviewed regularly to prevent drivers driving while affected by fatigue, or in breach of fatigue regulations.

2. Drivers of fatigue-regulated heavy vehicles may drive an unsafe vehicle on a road (hazard)

- The risk created by this hazard is a risk of serious injuries or fatalities to the driver and other road users, damage to road infrastructure and damage to the environment.

This risk can be minimised or eliminated by ensuring:

- Adequate vehicle standards policies and procedures are in place to manage risks associated with vehicle safety standards and roadworthiness; and
- Adequate reporting system for drivers to report vehicle maintenance issues, which also includes a system to monitor, audit and ensure all necessary repairs or alterations are completed as required; and
- Adequate due diligence within the transport haulage operator selection phase to verify suitability of the vehicles intended to be used, including requesting vehicle inspection history; and
- Prior to engaging a driver or subcontractor, find out whether they have a safe driving record or a reputation for running a safe and compliant business.

3. Drivers of fatigue-regulated heavy vehicles may drive an unsafe vehicle on a road (hazard)

- The risk created by this hazard is a risk of serious injuries or fatalities to the driver and other road users, damage to road infrastructure and damage to the environment.

This risk can be minimised or eliminated by ensuring:

- Adequate vehicle standards policies and procedures are in place to manage risks associated with vehicle safety standards and roadworthiness
- Adequate reporting system for drivers to report vehicle maintenance issues, which also includes a system to monitor, audit and ensure all necessary repairs or alterations are completed as required
- Adequate due diligence within the transport haulage operator selection phase to verify suitability of the vehicles intended to be used, including requesting vehicle inspection history

- Prior to engaging a driver or subcontractor, find out whether they have a safe driving record or a reputation for running a safe and compliant business.

Outcome

Between February 2019 and May 2019, the directors being executives of a legal entity, failed to exercise due diligence to ensure the legal entity complied with its primary duty under the *Heavy Vehicle National Law* (HVNL) to ensure safe transport activities, contrary to section 26D of the HVNL. The company contravened the duty under section 26C and that contravention exposed contracted drivers, to a risk of death or serious injury. The risk manifested and resulted in the death of the driver in May 2019.

In early 2022, the NHVR accepted an Enforceable Undertaking (EU) proposed by the directors. The EU required the following:

- Initiative 1 - Requires the development of a detailed HVNL Due Diligence Manual to enable companies and, more specifically, individual executives and managers to better understand their Chain of Responsibility obligations under the HVNL, and to develop their own personalised due diligence systems. Once completed, the HVNL Due Diligence Manual will be made available to the NHVR to distribute as it sees fit, and the industry generally. Initiative 1 outcome is simple but comprehensive manual suitable for an executive of a party in the Chain of Responsibility to develop their own personalised due diligence system in compliance with the HVNL. The estimated cost of the initiative is \$10,000.
- Initiative 2 - Requires the production of a video aimed at directors and executives of smaller scale operators in the industry. The video will commence with a personal account from the directors of the incident and include a general summary of Chain of Responsibility obligations under the HVNL, and appropriate due diligence steps. Initiative 2 outcome is a high production value, engaging video widely disseminated with a focus on the HVNL Chain of Responsibility, including the personal responsibility of executives imposed by in the HVNL. The video will also cover the tools and resources available from the NHVR. The estimated cost of the initiative is \$20,000.

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- Initiative 3 - Requires the directors to prepare and present a paper to the Australian Institute of Directors and/or other bodies. The presentation is to be recorded and made available for dissemination throughout the industry free of charge. Initiative 3 outcome is a personalised and engaging presentation to industry, made broadly available. The estimated cost of the initiative is \$6,000 (it is expected that half of this estimated cost will be attributed to the time the directors will spend presenting).

The initiatives will commence immediately upon acceptance of the EU and will be completed within 12 months of acceptance, with a total estimated cost of \$36,000.

Further information and the conditions of the Enforceable Undertaking can be found here:
<https://www.nhvr.gov.au/law-policies/prosecutions/enforceable-undertakings>

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