

9 February 2022  
Our Reference: 3120

Mark McCauley  
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To Mr McCauley

***Heavy Vehicle National Law***  
**Part 10.1A – Enforceable Undertakings**  
**REASONS FOR DECISION**

1. I have received your proposal for an Enforceable Undertaking per Part 10.1A of the *Heavy Vehicle National Law* (HVNL). For the reasons set out I am of the opinion the undertakings given by Mark MCCAULEY ('MCCAULEY') are appropriate enforcement options with regards to the relevant contravention.

**Background to the application**

2. It was alleged by the National Heavy Vehicle Regulator (NHVR) that:
  - a. Between 18 February 2019 and 17 May 2019, MCCAULEY being an executive of a legal entity, namely Goondicum Resources Pty Ltd ('Goondicum'), had a duty to exercise due diligence to ensure Goondicum, so far as reasonably practicable, ensured the safety of its transport activities.
  - b. Goondicum engaged in conduct and transport related activities that exposed contracted drivers, including Mr Brock RODE ('RODE'), to a risk of death or serious injury.
  - c. The risk manifested itself in the death of Mr RODE on 17 May 2019 at Monto in Queensland.
  - d. MCCAULEY failed to exercise due diligence to ensure Goondicum ensured the safety of its transport activities, under the primary duty imposed by section 26C of the HVNL, in contravention of section 26D of the HVNL.

3. The NHVR commenced a prosecution against MCCAULEY alleging the contravention of section 26D/26G of the HVNL.
4. On 31 January 2022, MCCAULEY wrote to the NHVR proposing an Enforceable Undertaking for the alleged contravention.
5. I have assessed the proposal submitted against the NHVR Policy – *Enforceable Undertakings*, and NHVR Guideline - *Proposing an Enforceable Undertaking* (“the guideline”).
6. In assessing the proposal in accordance with the evaluation requirements of Section 4 of the guideline I have considered the following factors.

#### The nature and extent of the act or omission alleged

7. I have taken into consideration the fact that there was no evidence of systematic non-compliance with the HVNL.

#### The person’s compliance history

8. While Goondicum was in operation, between 2000 and 2019, it was not convicted of:
  - any offence under the HVNL;
  - a breach of any safety duty under the work, health and safety legislation of a State, Territory or the Commonwealth;
  - a failure to comply with any enforceable undertaking; or
  - any other offence involving the death, serious injury or illness of any person involved in Goondicum’s business or undertaking.
9. Australian Criminal Intelligence Commission checks show that MCCAULEY has not been convicted of:
  - any offence under the HVNL;
  - a breach of any safety duty under the work, health and safety legislation of a State, Territory or the Commonwealth; or
  - a failure to comply with any enforceable undertaking.

Whether the EU delivers benefits to the public beyond the Promisor's compliance with the law

10. MCCAULEY has committed to the ongoing effective management of public risks associated with transport activities within their new roles with other companies.
11. MCCAULEY has proposed an undertaking, ensuring that the behaviour that led to the alleged contravention has ceased, and committed to taking all reasonably practicable steps to prevent similar contraventions within his employer companies.
12. MCCAULEY has further committed to ongoing continuous improvement in how he will manage risks associated with the business operations of his employer companies, including the review of new technology as and when it becomes available.
13. MCCAULEY has proposed (3) three initiatives to achieve the proposed outcomes.
14. The initiatives will commence immediately upon acceptance of the EU and will be completed within (12) twelve months of acceptance, with a total estimated cost of \$36,000.00.
15. These initiatives aim to educate, train, and raise awareness about the importance of complying with Chain of Responsibility laws within his new company management role and for all parties within the Chain of Responsibility, with a specific focus on the duty to exercise due diligence placed on Directors and Executives of legal entities.

***Initiative 1***

16. MCCAULEY will engage an appropriate partner to develop a detailed HVNL Due Diligence Manual to enable companies and more specifically individual executives and managers to better understand their Chain of Responsibility requirements 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. The estimated cost of this initiative is \$10,000.00.

***Initiative 2***

17. MCCAULEY will engage an appropriate partner to develop an induction video aimed at directors and executives of smaller scale operators in the industry. The induction video will commence with a personal account from MCCAULEY of the incident and include a general summary of Chain of Responsibility obligations under the HVNL and appropriate due diligence steps. It will also address the following particular topics:
  - the treatment of independent contractors;

- stressing personal responsibility for off-site matters;
  - addressing systems for monitoring the mechanical safety of vehicles operated by independent contractors (in addition to company owned vehicles);
  - fatigue management issues and systems to avoid gaps and deficiencies arising from shift changeovers; and
  - special circumstances and associated risks at times of change within an organisation (such as re-opening a moth-balled operation on care and maintenance).
18. The induction video will be granted a non-exclusive free licence to ensure it can be provided to the NHVR and other interested parties.
19. The estimated cost of this initiative is \$20,000.00. MCCAULEY proposes to appoint an external partner within two months of the commencement of the EU and deliver the completed project within six months of the commencement of the EU.

### *Initiative 3*

20. MCCAULEY will prepare and present a paper to the Australian Institute of Company Directors and/or other bodies as to the circumstances of the incident and how charges came to be laid against MCCAULEY, key risks and particular lessons learned from the incident, and a summary of the impact upon other executives. The presentation is to be recorded and made available for dissemination free of charge.
21. The estimated cost of this initiative is \$6,000.00. MCCAULEY proposes to have the presentation and paper ready to submit to the NHVR for approval within three months of the commencement of the EU, and the presentation to industry occurring within twelve months of the commencement of the EU.

### The quality of the strategies proposed and the extent to which they are likely to achieve measurable improvement in heavy vehicle transport safety

22. MCCAULEY proposes to provide information and training regarding the executive due diligence requirements of the Chain of Responsibility laws under the HVNL, a complex area of law that is not often discussed. Their commitment to sharing this information freely and publicly has the potential to assist others within the industry and will ensure the wide reach of important information.

The benefits of the proposal to the persons who might be affected by a similar contravention; the likely improvements in safety within the Promisor's business or operations; and the likelihood that the proposed undertaking will result in sustained improvement in compliance after its completion

23. The benefits of the proposed actions will not only increase awareness and understanding as to the due diligence requirements under the HVNL but, in creating a HVNL Due Diligence Manual, provide a simple but comprehensive tool suitable for any person within the Chain of Responsibility to develop a personalised due diligence system within their own business.
24. Through the publicly available video and presentations, the defendants, as directors of companies not exclusively involved in transport activities, undertake to educate their peers on the due diligence obligations of directors under the HVNL, despite the fact that the companies involved may not be traditional transport companies.

The person's ability, including financial ability, to meet the terms of the EU

25. MCCAULEY has not provided any financial reports; however, he has stated he has the financial capacity and operational experience to comply with the terms of the EU.
26. MCCAULEY has set a realistic timeframe for the implementation of the EU (immediate), with completion of all activities within 12 months of the EU commencing.

The significance of the commitment compared to the capability of the person

27. I have taken into consideration the fact that, through the proposed strategies, MCCAULEY has demonstrated an understanding of the importance of safety in transport operations.
28. The resources and projects proposed, as well as the personal experience MCCAULEY can provide, are of value to the industry and are commensurate to their capability.
29. The commitment is 21.80% of the maximum penalty that a court could impose for an individual of \$165,070.

The support the person has provided / has committed to providing into the future to an injured or affected person

30. While MCCAULEY noted that Mr RODE was not a worker of the legal entity, he offered a statement of regret acknowledging that Mr RODE's death had a substantial impact on his family and the employees of his independent haulage company among other people.

31. Goondicum provided support to its own workers by shutting down the site for a period of 24 hours to enable engagement with all affected staff and by providing worker support.

#### Input from injured and affected persons

32. Sarah-Jane DAVIS, the partner of the deceased, has been consulted about the proposed EU. Ms Davis has expressed support for the proposed activities and considers the proposed activities would be a more effective outcome than a court imposed financial penalty. Ms Davis has thanked the NHVR for its efforts in investigating and prosecuting these matters and hopes that the EU will result in a safer industry.

#### **Reason for Decision**

33. I have considered the merits of continuing the prosecutions against MCCAULEY in order to meet the sentencing principles of rehabilitation, punishment, deterrence, and denouncing of the conduct. I consider in all of the circumstances of this matter, on balance, I am of the opinion that the Enforceable Undertaking proposed by them is an appropriate enforcement option which will meet community expectations.
34. I conclude that the Enforceable Undertaking is a preferred enforcement option to continuing the prosecution for the relevant contravention for the following key reasons:
  - a. The opportunity to provide lasting change to the companies MCCAULEY goes on to be involved with and to the wider transport industry. Three activities will be undertaken in order to deliver benefits to parties in the chain of responsibility and the broader community.
  - b. The activities and benefits proposed would not have been achieved by prosecution alone. Upon a conviction a financial penalty would have been imposed on MCCAULEY. This would not have had the same direct impact on promoting safety awareness in the industry as the strategies outlined in the Enforceable Undertaking.
  - c. The Enforceable Undertaking proposes material and tangible changes that can lead to the broader industry taking greater steps to address fitness for duty in drivers.
  - d. Education, systems and training which result in fewer contraventions will lead to safer heavy vehicles on the road and less impact on road infrastructure.
  - e. The activities proposed are likely to achieve improvements in the heavy vehicle transport industry and other communities in which MCCAULEY operates.

35. Pursuant to section 590A of the HVNL, it is my decision to accept the Enforceable Undertaking MCCAULEY offered on 31 January 2022.
36. MCCAULEY is required to send all supporting documentation in relation to this EU to [intelligence@nhvr.gov.au](mailto:intelligence@nhvr.gov.au).

Yours sincerely



Sal Petrocitto  
**Chief Executive Officer**