The hard road ahead: 'Due diligence' obligation under new 'chain of responsibility' regime

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The Australian road transport industry is highly competitive and characterised by a significant number of operators, ranging from owner-drivers and small family businesses to national and multi-national corporations. Small operators with one to two vehicles represent almost 90 per cent of all operators and account for approximately 75 to 85 per cent of turnover in the industry.¹

Competitive and economic pressures mean there is an incentive for operators at the base of the supply chain to compromise on safety to meet the delivery and price requirements of customers at the top of the supply chain. These pressures contribute to poor safety outcomes: the road transport industry has a high rate of serious injuries and fatalities (nearly twice the average across all industries).² Safe Work Australia reported 535 worker fatalities in the road transport industry between 2003 and 2015, accounting for 17 per cent of all work-related deaths in Australia during that period.³

Heavy Vehicle National Law
The Heavy Vehicle National Law (HVNL) regulates the use of heavy vehicles (vehicles with a GVM or ATM of more than 4.5 tonnes) in all states and territories except Western Australia and the Northern Territory. The current regime deems parties in the ‘chain of responsibility’ responsible for a series of on-road offences such as breaches of vehicles’ mass, dimension and loading requirements and breaches by drivers of speed and fatigue requirements.

On 1 December 2016, Parliament passed amendments to the HVNL to introduce a new regime that imposes a ‘primary duty’ on all businesses in the ‘chain of responsibility’ and a ‘due diligence’ obligation on all executives of those businesses. The new regime is expected to commence by proclamation in mid-2018.⁴

Under the new regime:

- a party in the ‘chain’ may be prosecuted because it does not have in place practices and procedures that ensure the safety of transport activities directly or indirectly related to its operations (without the need for a serious incident to have occurred)
- an executive may be prosecuted without the corporation first committing an offence.

The new regime aims to improve the safety of road transport and promote pre-emptive risk management so that the HVNL better aligns with other national safety legislation, such as the Model Work Health and Safety Act and the Rail Safety National Law.

Who is in the ‘chain of responsibility’?
The ‘chain of responsibility’ includes those parties who have control or influence over transport activities involving heavy vehicles. Under the HVNL, the parties in the ‘chain of responsibility’ are:
All Australian businesses that make use of heavy vehicles to send or receive goods, whether directly or indirectly, including manufacturers, producers, wholesalers, distributors and retailers are potentially consignors and consignees and therefore part of the chain of responsibility. Freight forwarders and freight brokers are also part of the chain. The regime therefore affects a wide variety of Australian businesses and industries including agriculture, mining, construction, wholesale and retail.

What is the ‘primary duty’ under the new regime?
Under the new regime, all parties in the chain of responsibility will have a primary duty to ensure, so far as is reasonably practicable, the safety of their transport activities related to a heavy vehicle. Transport activities’ is broadly defined to comprise activities ‘associated with the use of a heavy vehicle on the road’ including off-road business practices and decision-making.

The primary duty extends, so far as is reasonably practicable, to:

- eliminating public risks and, to the extent it is not reasonably practicable to eliminate public risks, minimising public risks
- ensuring the party’s conduct does not directly or indirectly cause or encourage a driver or another party in the chain to contravene the HVNL.

…the due diligence obligation potentially extends beyond directors to senior managers who have responsibility for transport and safety functions.

To whom does the due diligence obligation apply?
The new regime will impose a positive obligation on ‘executives’ of ‘legal entities’ to exercise due diligence to ensure that the entity complies with its primary duty. This obligation will hold executives accountable for the control and influence they have over the safety of their business operations.

‘Legal entity’ is defined as a corporation, unincorporated partnership or unincorporated body. ‘Executive’ is defined broadly as an ‘executive officer’ of a corporation, partner of an unincorporated partnership or management member of an unincorporated body. An ‘executive officer’ of a corporation is not just a director but also includes any person ‘who is concerned or takes part in the management of the corporation’. Accordingly, the due diligence obligation potentially extends beyond directors to senior managers who have responsibility for transport and safety functions.

There is a similar due diligence obligation under the Model Work Health and Safety Act. However, the Model Work Health and Safety Act does not cast the net as widely, with the due diligence obligation only applying to a director, secretary or person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation.

What is the due diligence obligation?
‘Due diligence’ is defined as taking reasonable steps:

to acquire, and keep up to date, knowledge about the safe conduct of transport activities

to gain an understanding of:

- the nature of the legal entity’s transport activities
- the hazards and risks, including the public risk, associated with those activities

to ensure the legal entity has, and uses, appropriate resources to eliminate or minimise those hazards and risks

to ensure the legal entity has, and implements, processes:

- to eliminate or minimise those hazards and risks
- for receiving, considering, and responding in a timely way to, information about those hazards and risks and any incidents
- for complying with the legal entity’s primary duty

to verify the resources and processes mentioned in paragraphs detailed above are being provided, used and implemented.

The due diligence obligation does not require executives to have perfect knowledge of the minutiae of the affairs of their business. However, executives must take an active and inquisitive role in identifying hazards, assessing risks, implementing a risk management system and monitoring and reviewing that system. In ASIC v Healey [2011] FCA 717, Justice Middleton stated (in the context of financial due diligence obligations):

A director is an essential component of corporate governance. Each director is placed at the apex of the structure of direction and management of a company. The higher the office that is held by a person, the greater the responsibility that falls upon him or her. The role of a director is significant as their actions may have a profound effect on the

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community, and not just shareholders, employees and creditors.

Nothing I decide in this case should indicate that directors are required to have infinite knowledge or ability. Directors are entitled to delegate to others … the carrying on of the day-to-day affairs of the company.

What each director is expected to do is to take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her.

What are the penalties for failing to exercise due diligence?

Executives who fail to exercise due diligence face significant pecuniary penalties and even jail sentences. The penalties for executives under the new regime are divided into three categories:

- **Category 1:** a reckless breach creating risk of death or serious injury attracts a maximum penalty of $300,000 or five years’ imprisonment (or both)
- **Category 2:** a breach of duty creating risk of death or serious injury (without recklessness) attracts a maximum penalty of $150,000
- **Category 3:** any other breach attracts a maximum penalty of $50,000.

The penalties that can be imposed on a corporation for a breach of the primary duty are significantly higher: the maximum pecuniary penalty is $3 million for a Category 1 breach.

How can executives prepare for the new regime and minimise their exposure?

Executives of legal entities in the chain of responsibility need to prepare for the new regime and ensure the businesses they manage fulfil their primary duty. These steps may include:

- identifying and considering the risks associated with the transport-related aspects of their businesses and ways of removing or minimising those risks
- developing a safety management plan that identifies hazards associated with particular transport activities
- ensuring that information about processes to ensure the safety of specific road transport operations is readily available
- ensuring that appropriate resources and procedures are used to eliminate or minimise risks in relation to the maintenance of heavy vehicles
- establishing processes for considering and responding to information about incidents, hazards and risks
- ensuring that policies and procedures to manage identified risks are properly documented and that personnel are trained and instructed in those policies and procedures
- ensuring that measures are in place to monitor compliance with policies and procedures
- consulting with other parties in their supply chain to identify and manage risks
- ensuring that contractual responsibilities with other parties in their supply chain are properly documented.

Notes

1 A/Prof Louise Thornthwaite and Dr Sharron O’Neill, Evaluating Approaches to Regulating WHS in the Australian Road Freight Transport Industry: Final Report to the Transport Education, Audit and Compliance Health Organisation Ltd, Macquarie University, Centre for Workforce Futures (November 2016).


4 The Heavy Vehicle National Law and Other Legislation Amendment Act 2016 (Amendment Act) was by passed by Queensland Parliament (as the host jurisdiction for the HVNL) on 1 December 2016. The reforms will automatically roll out to other participating jurisdictions by way of each state and territory applying the uniform law.

5 Section 10 of the Amendment Act introducing new section 26C of the HVNL.

6 Section 7 of the Amendment Act amending section 5 of the HVNL.

7 Section 10 of the Amendment Act introducing new section 26C of the HVNL.

8 Section 10 of the Amendment Act introducing new section 28D of the HVNL.

9 Ibid.

10 Ibid.

11 Section 5 of the HVNL.

12 Section 27 of the Model Work Health and Safety Act.

13 Section 10 of the Amendment introducing new a 26D(3) of the HVNL.

14 Explanatory Notes, Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (Qld) 13.

15 Ibid.

16 Ibid.

17 Ibid.
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