

## Case learnings – April 2023

### Facts of the case

An individual was the sole owner and operator of a towing company.

In February 2019, the individual agreed to assist in towing a vehicle that had experienced mechanical difficulties. It is alleged that in the process of loading the vehicle, the individual left the vehicle suspended on the raised tilt tray and walked away. Around this time, it is alleged that the owner of the vehicle walked behind the tow truck and the bull bar of the suspended vehicle gave way, rolled down the raised tilt tray and crushed the owner.

The owner of the vehicle died as a result.

Following a trial in the Local Court, the individual was found not guilty of a Category 1 offence on the basis that the individual was not 'reckless' to the risk of death, serious injury or illness.



### Findings on appeal

The Regulator lodged an appeal, arguing that incorrect legal principles were applied in the Local Court when the meaning of recklessness under the *Heavy Vehicle National Law* was being considered.

The Court reiterated that Primary Duty offences impose a very high duty for parties to ensure safety in their operations and avoid or minimise risks.

In considering Category 1 offences, contrary to section 26F of the *Heavy Vehicle National Law*, the Court said:

*"The evident purpose of section 26F is to deter operators from engaging in reasonably avoidable conduct knowing that there is a risk of harm but proceeding nonetheless."*



After hearing submissions from the individual and the Regulator, the Court agreed with the Regulator that the Local Court had made an error when considering if the individual was reckless to the risk of death, serious injury or illness. The Court found that:

*"On the proper construction of section 26F, a person is reckless as to the risk of death or serious injury or illness if they are aware of the possibility of death or serious injury or illness occurring as a result of their conduct and nevertheless proceed to engage in that conduct. The possibility need not have a probability greater than 50 per cent, although it must be a real, as opposed to a fanciful or theoretical, possibility."*

The Regulator's appeal was allowed, and the orders of the Local Court were set aside. A further order was made by the Court that the matter return to the Local Court for retrial.

### Key takeaways

Considering the potentially significant consequences for non-compliance with your primary duty, it is important that you review your safety systems and ensure you are doing everything reasonably practicable to eliminate or minimise the risks in your transport activities.

Below are some takeaways from this case:

- Under the *Heavy Vehicle National Law*, a person is reckless as to the risk if they are **aware of the possibility** of death, serious injury or illness as a result of their conduct and still choose to engage in that conduct
- It doesn't matter if there is less than a 50% chance of the risk occurring – **if death, serious injury or illness is a possibility, it's a real risk for you.**
- If you ignore a risk that is known to you, you may be found to be reckless.

- The Heavy Vehicle National Law is concerned with potential harm not actual harm. **An accident or fatality doesn't have to occur for charges to be brought.**
- The definition of reasonably practicable requires a **holistic assessment** of what is reasonably practicable having regard, amongst other things, to the likelihood of the risk happening and the harm if the risk happens.

## Guidance for Operators

The case provides some reasonably practicable measures operators can take to reduce or minimise the risks associated with towing vehicles by tow truck, including:

- When loading on to a tow truck, maintain sight of all persons nearby.
- Instruct all persons nearby of potential risks or dangers and direct them to safe resting locations.
- Do not leave vehicles suspended and unattended.
- Acquire knowledge about the safe conduct of loading vehicles.
- Develop and implement risk assessment processes.
- Ensure the tow truck is fit for purpose prior to use.

These reasonably practicable measures are just examples of potential controls that you can implement and should be read in conjunction with those outlined in the registered industry [Master Code](#). Asking drivers if they have secondary employment that may impact their levels of fatigue;



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