

Disclosure

Purpose

The National Heavy Vehicle Regulator (NHVR) initiates proceedings and prosecutes offences against the *Heavy Vehicle National Law* (HVNL) and specific state and territory road safety legislation in South Australia, Tasmania, Victoria, New South Wales and the Australian Capital Territory.

A fundamental tenet of criminal law is the Accused's right to a fair trial. The need to ensure that the Accused receives a fair trial is the ultimate criterion for determining what material must be disclosed by the prosecution. Disclosure must occur in a timely manner. A failure to disclose may result in a miscarriage of justice.

This policy outlines the guiding principles and considerations the NHVR applies in making decisions regarding the disclosure of materials to an Accused throughout the conduct of the prosecution process.

This policy:

- is a public document and is based on the principles of fairness, transparency, consistency, and accountability the NHVR seeks to apply in prosecuting under the HVNL;
- is available to all interested members of the public, the legal profession, and other law enforcement agencies; and
- can be accessed on the NHVR's website: www.nhvr.gov.au.

Scope

This policy:

- applies to material that is in the possession of, or the information is known by, the prosecution;
- applies to the NHVR and any agency that refers matters for prosecution and/or prosecutes on behalf of the NHVR;
- applies throughout the entire prosecution process and continues after trial or hearing and the conclusion of any appeals; and
- will be reviewed regularly, with any changes made public.

This policy does not:

- apply to police forces prosecuting HVNL matters, although they are encouraged to follow the principles of this policy; or
- attempt to cover all questions and matters that can arise in the disclosure process.

Policy statement

The NHVR will uphold the Accused's right to a fair trial through fairness, transparency, and accountability in the exercise of its disclosure obligations throughout the course of the prosecution process.

Principles

The application of this policy will be consistent with the following principles.

The duty of disclosure

1. The prosecution's duty of disclosure is ethical in nature and is an obligation owed to the court. The overarching consideration in any disclosure decision is to ensure an Accused's right to a fair trial. A failure to disclose may result in a miscarriage of justice.
2. Subject to any claim of public interest immunity, legal professional privilege, or any statutory provision to the contrary and, in addition to any applicable statutory obligations relating to disclosure, the prosecution is under a continuing obligation to fully disclose, in a timely manner, all known material to an Accused that, on a sensible appraisal:
 - a. is relevant or possibly relevant to an issue in the case;
 - b. raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to rely on; and
 - c. holds out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to either of the above.
3. Examples of the above includes material that:
 - a. can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the Accused having committed the offence).
 - b. might reasonably be expected to assist the Accused in advancing a defence.

- c. might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.¹
- 4. The prosecution's duty of disclosure is ongoing and continues after trial and the conclusion of any appeal.
- 5. All due care must be taken to protect the security of sensitive documents and other material and information, particularly where its disclosure may:
 - a. affect the safety of individuals; or
 - b. jeopardise continuing investigations.
- 6. Criminal procedure legislation in most jurisdictions provides that material served on the Accused must not disclose the address, date of birth or the telephone number of witnesses unless that information is relevant or an order has been made for those details to be disclosed.

Within the Prosecution's possession and/or knowledge

- 7. A precondition for prosecution disclosure is that the material is in the possession of, or the information is known by, the prosecution. For the purposes of this policy, and at common law, there is no distinction between the prosecuting agency and the investigative agency.² The courts generally regard the investigative agency and the prosecuting agency as 'the prosecution'.
- 8. The prosecution largely depends on the investigative agency to inform it of the existence of material which should be disclosed to the defence—whether the investigative agency or other areas within the Regulator hold it, or the investigative agency is aware it is held by a third party.
- 9. If a matter involves investigation by more than one agency, the prosecution depends on the investigative agency which refers the brief, to inform the prosecution of all disclosable material which any of the agencies involved hold or are aware of.

Material withheld from disclosure

- 10. Material may be withheld from disclosure if the following apply:
 - a. public interest immunity;

¹ Examples are provided at Annexure A as a guide.

² For the purposes of this policy, 'investigative agency' includes the Investigations Unit within the NHVR.

- b. precluded by statute; or
- c. legal professional privilege (LPP).
- 11. Where the investigator or prosecutor considers material may be subject to a claim, the prosecutor should not disclose that documentation, material or information to the defence without first consulting with the investigator. The investigator should be given reasonable opportunity to seek separate legal advice.
- 12. For internal NHVR referrals, the NHVR investigator should seek legal advice from the NHVR Legal Services Unit. In the event the investigator and the lawyer from Legal Services disagree as to what should be disclosed, the matter is to be referred to the Director of Legal Services for determination.
- 13. If a claim is maintained, the defence should ordinarily be informed to the extent possible without compromising the claim (e.g. the fact that there is an informer would not usually be disclosed). Notification of the existence of such material may in some circumstances generate the issuing of a subpoena.
- 14. Where a claim of privilege or immunity is pursued, the question of disclosure will be determined by the outcome of that claim in court.
- 15. Where a claim applies, consideration should be given to the fact that failure to disclose the relevant material might result in unfairness to an Accused. In that circumstance, the following should be considered:
 - a. should instructions be sought for LPP to be waived (noting that the maintenance of a claim for LPP over disclosable material might give rise to a miscarriage of justice)?
 - b. should a lesser charge be preferred, to which the material covered by the claim is not relevant?
 - c. should the prosecution proceed at all if the claim is to be maintained?

Disclosure and sentencing

- 16. Any information or material that may affect an assessment of the moral culpability of an Accused on sentence should be disclosed. The prosecution relies on the investigative agency to inform it of such material.

Timing of disclosure

- 17. Disclosure should be timely and occur as soon as practicable. However, in certain circumstances, it

may be appropriate to delay disclosure. For example, where:

- a. disclosure might prejudice ongoing investigations, it may be appropriate to delay disclosure until after the investigations are completed; or
- b. the prosecution is of the opinion that to disclose evidence is likely to lead to a witness being intimidated, or a risk to the safety of a witness, or to some other interference with the course of justice.

18. Where disclosure of material has been delayed in accordance with the preceding paragraph, the defence should ordinarily be informed, unless doing so might compromise the reason for the delay (e.g. the existence of an ongoing investigation).

Method of disclosure

19. The investigative agency should provide the prosecution with a Disclosure Certificate³ itemising all potentially relevant and disclosable material, noting any likely claims to be made over any material. The Disclosure Certificate should include a clear description of the nature of that material unless to do so would compromise a claim.

Disclosure of material held by third parties

20. Where the prosecution is aware of disclosable material that is in the possession of a third party, the defence should be informed of the:

- a. name of the third party;
- b. nature of the material; and
- c. address of the third party (unless there is good reason for not doing so and if so, it may be necessary for the prosecution to facilitate communication between the defence and the third party).

The Director of Prosecution’s legal privilege

21. Legal privilege will ordinarily be claimed against the production of any document in the nature of an internal legal advice, such as a submission to the Director of Prosecutions and submissions between prosecuting solicitors and external counsel engaged on behalf of the Regulator. Only the Director of Prosecution may approve any waiver of privilege.

22. The Director of Prosecution’s legal privilege extends to documents containing material created or gathered for the dominant purpose of providing legal advice to the Director, including internal advice, memoranda, summaries, internal emails, conference notes, and file notes.
23. There is no implied or automatic waiver of legal privilege on conference notes when a witness makes a disclosure that significantly adds to or is inconsistent with a previous statement. If a witness discloses information in a conference that warrants disclosure to the defence, as best practice, an arrangement should be made for the witness to make a supplementary statement, where practicable, which will then be disclosed to the defence.
24. The giving of reasons for prosecutorial decision making generally does not constitute a waiver of legal privilege in respect of matters in which reasons have been given. Internal legal advice must not be released when reasons are given.

Responsibilities

The following positions are responsible for implementing this policy.

Position	Responsibilities
Investigator/Informant	Ensures all potentially disclosable material in the knowledge of the investigator/informant arising from the investigation (whether the material is in the possession of the investigator/informant or a third party), is brought to the prosecutor’s attention.
Prosecutor	Ensures all disclosable material, in accordance with this policy, is brought to the Accused and/or their legal representative’s attention.
Lawyer for Legal Services	Provides legal advice to internal NHVR investigators with respect to any potential claims over otherwise disclosable material.

³ See, sample at Annexure B.

Director of Legal Services	Determines whether a claim is to be made over material when there is a disagreement between the internal NHVR investigator and the lawyer for Legal Services.
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Director of Prosecutions	Approves the waiver of any LPP.
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Definitions

See the NHVR Governance Glossary for a list of terms related to this policy or processes, or the NHVR Glossary of Common Terms for terms used in the heavy vehicle industry.

Annexure A – Disclosure Affecting Credibility or Reliability of a Prosecution Witness

1. Consistent with paragraph 3(c) of this policy, the prosecution should disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:
 - a. a relevant previous conviction or finding of guilt;
 - b. a statement made by a witness which is inconsistent with any other statement made by the witness;
 - c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission);
 - d. evidence before a court, tribunal, or Royal Commission which reflects adversely on a witness;
 - e. any physical or mental condition which may affect reliability;
 - f. any concession or benefit which has been offered or granted to a witness in order to secure that person's testimony for the prosecution; and
 - g. where credibility is in issue, that the witness has been charged with a relevant offence.
2. Some examples of material relevant to the credibility or reliability of a prosecution witness of the kind referred to in paragraph 4(c) of this policy are discussed below.

Previous convictions

3. Previous convictions for perjury and offences involving dishonesty should always be disclosed to the defence whereas minor prior convictions for formal or non-contentious witnesses may not meet the requirements for disclosure.
4. The prosecution must, on request, disclose a copy of a criminal history of a proposed witness which is in the possession of the prosecution. Where blanket requests for 'all witnesses' are made, the prosecution should attempt to negotiate with defence practitioners to ensure that unnecessary checks do not have to be undertaken for formal or non-contentious witnesses.
5. The duty to disclose relevant prior convictions is not confined to cases of specific requests for the criminal histories of witnesses. For that reason, it is

appropriate for the prosecution to ensure, prior to the commencement of any trial or summary hearing, that criminal history checks have been undertaken for significant civilian witnesses whose credit may be in issue. In addition to paragraph 3 of this Annexure, in some cases convictions relating to driving-related offences and use of illicit substances might be relevant especially where the witness is to give evidence about their employment as a heavy vehicle driver or manager/supervisor of heavy vehicle drivers.

Adverse findings

6. Where a prosecution witness has been the subject of an adverse finding (including a finding of dishonesty) in other criminal proceedings, disciplinary proceedings, civil proceedings or a Royal Commission, such adverse findings should be disclosed by the prosecution to the defence if it meets the requirements for disclosure set out in the Duty of Disclosure. Consideration should be given to the nature of the evidence expected to be given by that witness and the issues likely to arise in the case at hand. For example, it may not be necessary to disclose adverse findings which arise from inefficiency, but it might be necessary to disclose any history relevant to those matters in paragraph 5 of this Annexure.

Concessions to witnesses

7. The prosecution must disclose:
 - a. any concession offered or provided to a witness with respect to their involvement in suspected offences in order to secure their evidence for the prosecution, whether as to choice of charge, the grant of an undertaking or otherwise;
 - b. any monetary or other benefit or inducement that has been claimed by, or offered or provided to, a witness. This does not include any payments made in the ordinary and usual course of a witness coming to court to give evidence (e.g. the payment of travel and accommodation expenses or the fees of expert witnesses) and disclosure will be subject to any legislative requirements such as witness protection legislation; and
 - c. where the witness participated in the suspected offending that is the subject of the charges against the Accused, whether the witness has been dealt with in respect of their involvement and, if so, whether the witness received a

discount on sentence as a result of undertaking to cooperate with the prosecution in relation to the current matter.


Disclosure affecting the competence or credibility of an expert witness or of expert or scientific evidence

8. The prosecution should disclose to the defence information of which it is aware that is relevant or potentially relevant to the competence or credibility of an expert witness the prosecution intends to rely on.
9. The prosecution should also disclose to the defence information of which it is aware that is in the form of an expert opinion and/or in the nature of scientific evidence, which differs from such evidence already received by the prosecution or in some way casts doubt on the opinions or evidence on which the prosecution intends to rely where that opinion or evidence is relevant and not merely speculative.

Disclosure of a statement by a witness who is not credible

10. If the prosecution has a statement from a person whose evidence meets the requirements for disclosure as set out in the Duty of Disclosure, but who will not be called because they are not credible, the defence should be provided with a copy of the statement of that witness.

Annexure B – Disclosure Statement – Certificate Template Form (sample)



Disclosure Statement -
Certificate

Form

Important information

Disclosure should be timely and occur as soon as is reasonably practicable. The disclosure obligation is ongoing throughout the prosecution process and continues after the trial or hearing and the conclusion of any appeals. This form must be completed in full and accompany any brief of evidence that is supplied to the NHVR.

To:	NHVR Director of Prosecutions
From:	[Enter name of officer]
Agency:	
Date:	[Select date]

Details

This certificate relates to the brief of evidence in respect of the proposed prosecution of [insert name] for the offence(s) of [insert offence(s)]

I understand that I have a duty to disclose to the NHVR the existence of material which is required to be disclosed pursuant to paragraph 18 (1) of the *Working with Prosecutions at the National Heavy Vehicle Regulator Guidelines* for dealings between investigators and Prosecutions at the National Heavy Vehicle Regulator (the Policy), whether in the possession of the NHVR investigator or a third party, that is not included in the brief of evidence.

I understand such material to be any material which:

- is required to be disclosed by any applicable statutory obligations; or
- can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
- might reasonably be expected to assist the accused to advance a defence; or
- might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.

I certify that to the best of my knowledge and belief:

There is no material that is required to be disclosed pursuant to paragraph 18 (1) of the Policy.

There is material that is required to be disclosed pursuant to paragraph 18 (1) of the Policy and the NHVR has been provided with:

- a list of that material (see attached Schedules) and/or
- a copy or part of that material.

There is material that is required to be disclosed pursuant to paragraph 18 (1) of the Policy that may be immune from disclosure because of legal professional privilege, public interest immunity or preclusion by statute which will be made available for examination by the NHVR where appropriate (see attached Schedules).

Signed

Signature of officer:	
Name of officer:	[Enter name]
Date:	[Select date]

Rev: 1.0 - Date: 14/10/2021
Page: 1 of 3
OneTree No: DOC21/39192

Disclosure Statement - Certificate
Doc Owner: Prosecutions

Last review date: 12/10/2021
Next review date: 12/10/2023

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Schedules

A. Index material subject to disclosure:

- Material that potentially runs counter to the prosecution case or might reasonably be expected to assist the accused to advance a defence, including material in the possession of third parties
- Material potentially affecting the credibility or reliability of a prosecution witness, including material in the possession of third parties
- Material potentially affecting the credibility or reliability of a prosecution witness, including material in the possession of third parties
- Material that is required to be disclosed pursuant to local statutory obligations relating to disclosure, including material in the possession of third parties.

Description	Held by investigator or third party	Comments	Copy to NHVR (Yes/No)
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No

B. Material that meets the disclosure test that may be protected from disclosure and the reason it is protected (e.g. public interest immunity, legal professional privilege etc), including material in the possession of third parties

Description	Protection sought	Held by investigator or third party	Copy to NHVR (Yes/No)
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No
			<input type="checkbox"/> Yes <input type="checkbox"/> No

C. Persons who have not provided a statement in the brief however may be able to give evidence in relation to a matter which meets the disclosure test.

Name	Contact details	Comments

D. Related investigations.

Name of persons investigated	Comments