

28 November 2023

Our Reference: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

Re: Nelson Joseph Takiwa Enforceable Undertaking proposal

Heavy Vehicle National Law

Part 10.1 – Enforceable Undertakings

REASONS FOR DECISION

Introduction

1. In accordance with section 590A (7) of the Heavy Vehicle National Law (HVNL), I provide written notice and reasons for my decision to accept the Enforceable Undertaking proposed by Nelson Joseph Takiwa (the EU proposal)¹ pursuant to Part 10.1A of the HVNL.
2. I have considered the EU proposal and assessed it against the National Heavy Vehicle Regulator (NHVR) Prosecution Policy (the policy), Enforceable Undertakings Policy (the EU policy) and the Guidelines on Proposing an Enforceable Undertaking (the EU Guidelines). For the reasons set out below, I am of the opinion that the EU proposal, in the circumstances, is an appropriate enforcement option for the particular contravention alleged in this case.

The Alleged Facts

3. On 8 October 2022, an Isuzu heavy vehicle bearing (SA) registration [REDACTED] was detected travelling between Safe-T-Cam sites in less than the allowable travel time between 12:04am on 7 October 2022 at Willaston North Safe-T-Cam site and 7:39pm on 8 October 2022 at Tweed Heads Safe-T-Cam site.

¹ Enforceable Undertaking proposed by Nelson Joseph Takiwa pursuant to Chapter 10.1A of the HVNL dated 24/10/2023.

4. On 2 November 2022, an authorised officer from the NHVR issued a Notice to Produce by registered post to the registered operator Tuks Excavations Pty Ltd requesting the name and address of the driver at the time of the alleged offence.
5. On 14 November 2022 a response was received from the registered operator nominating Nelson Joseph Takiwa as the driver of the heavy vehicle .
6. Mr Takiwa forwarded his work diary pages dated 7 October 2022 and 8 October 2022 to the NHVR for inspection.
7. Upon inspection of Mr Takiwa's work diary, namely work diary pages dated 7 October 2022 and 8 October 2022, the NHVR identified a breach of the NHNL between 10:45am on 7 October 2022 and 10:45am on 8 October 2022 when the Mr Takiwa had worked 15 hours and 45 minutes in a 24-hour period.
8. Mr Takiwa worked an excess of 3 hours and 45 minutes placing the offence in the critical risk category.
9. On 16 September 2023, the NHVR commenced the prosecution against Mr Takiwa for the alleged incident between 7 October 2022 and 8 October 2022. The maximum penalty available for the offence is \$17,740.00

The Proposed Enforceable Undertaking

10. The EU proposal comprises three initiatives to be completed within six months for the training and donation, and 12 months to be registered with Logmaster Australia in the use of an electronic work diary. The initiatives will commence from the date of the NHVR's acceptance of the EU. The total cost estimated is \$2,502.00
11. The three initiatives can be summarised as follows. Mr Takiwa undertakes to:
 - a. Enrol with an external training services provider namely [REDACTED] to complete the following courses:
 - i. Apply a Fatigue Risk Management System (TLIF0005)
 - ii. Administer a Fatigue Risk Management System (TLIF0006)
 - iii. Ensure the Safety of Transport Activities (CoR) (TLIF0009)
 - iv. Monitor the Safety of Transport Activities (TLIF0014)
 - b. Register with Hubfleet for 12 months and begin using an electronic work diary via mobile phone and provide monthly invoices to NHVR of the subscription.

- c. Make a donation of \$1,500.00 to Australian Road Safety Foundation.

Criteria to be applied

12. In arriving at my decision, I have evaluated the EU proposal against the 11 evaluation criteria in Section 4 of the EU Guidelines namely:
- 1) The nature and extent of the omission alleged;
 - 2) The Promisor's compliance history;
 - 3) Whether the EU proposal delivers benefits to the public beyond the Promisor's compliance with the law;
 - 4) The quality of the strategies proposed and the extent to which they are likely to achieve measurable improvement in heavy vehicle transport safety;
 - 5) The likely improvements in safety within the Promisor's business or operations;
 - 6) The Promisor's ability, including financial ability, to meet the terms of the EU proposal;
 - 7) The significance of the commitment compared to the capability of the Promisor;
 - 8) The support the Promisor has provided and has committed to providing into the future to an injured or affected person(s);
 - 9) Input from injured and affected persons;
 - 10) The likely outcome should the matter be dealt with through legal proceedings;
 - 11) Reports or assessments of investigating or prosecuting agencies who have conduct of the matter.
13. With regards to criteria (1) and (2), I have considered the nature and extent of the conduct alleged and Mr Takiwa's compliance history. I acknowledge that prior to these allegations, I am not aware of any convictions for fatigue breaches of the HVNL.
14. With regards to criteria (3) and (4), I have considered that the EU proposal initiatives benefit the public beyond the compliance of the law, are of good strategic quality, and have potential to make noticeable positive change in the transport industry in terms of implementation of safety measures.
15. With regards to criteria (5), I acknowledge the proposal initiatives are likely to improve Mr Takiwa's transport operations.

16. With regards to criteria (6), I acknowledge that Mr Takiwa has the ability to meet the terms of the EU proposal.
17. With regards to criteria (7), I have considered that Mr Takiwa has taken into account the significance of the EU commitment, compared to his capability.
18. With regards to criteria (8) and (9), concerning the EU proposal's support of injured or affected person(s) and input from injured and affected persons, I have found these factors are not a relevant consideration bearing in mind the specific facts of this matter.
19. With regards to criteria (10) and (11), concerning the likely outcome should this matter be dealt with through legal proceedings and the views of investigating and prosecuting agencies, I have similarly taken these matters into account.

Conclusion

20. Considering all of these criteria, I am of the opinion that it is appropriate to accept the EU proposal as an alternative to prosecution. Consequently, I have decided to accept the proposed EU and advise that the legal proceedings against Nelson Joseph Takiwa will be withdrawn.

Yours sincerely,



Raymond Hassall

Executive Director, Statutory Compliance