



Proposing an Enforceable Undertaking Guideline

August 2022

Document properties

| | | | |
|---------------------------|--------------------------------------|----------------------|-----------------------|
| Identifier | DOC19/16406 | | |
| Document title | Proposing an Enforceable Undertaking | Document type | Guideline |
| Approver name | Belinda Hughes | Title | Director Prosecutions |
| Approver signature | By email | Approved date | 17/08/2022 |

Caveats

| | |
|-----------------|--|
| Use | This document is for internal NHVR use and distribution only and subject to employee confidentiality obligations. |
| Printing | The current electronic copy is considered true version of any controlled document. Uncontrolled hard copies (e.g. print outs) are to be considered a point in time reference only. |

Contents

| | | |
|----------|---|-----------|
| 1 | Introduction | 5 |
| 1.1 | Purpose | 5 |
| 1.2 | Scope | 5 |
| 2 | About enforceable undertakings | 5 |
| 2.1 | Defining enforceable undertakings | 5 |
| 2.2 | The nature of undertakings..... | 5 |
| 2.3 | Acceptance of undertakings..... | 6 |
| 2.3.1 | Investigations and court proceedings | 6 |
| 2.3.2 | Category 1 offences | 6 |
| 2.3.3 | Other circumstances | 6 |
| 2.4 | Benefits and costs of entering an undertaking..... | 6 |
| 3 | Submitting a proposal | 7 |
| 3.1 | Initiating an undertaking | 7 |
| 3.2 | Contents of the undertaking | 7 |
| 3.2.1 | General information..... | 7 |
| 3.2.2 | Enforceable terms..... | 8 |
| 3.2.3 | Unacceptable inclusions..... | 9 |
| 3.3 | Finalising the proposal..... | 9 |
| 3.4 | Varying or withdrawing an undertaking..... | 9 |
| 4 | Evaluating the proposal..... | 9 |
| 4.1 | Evaluation criteria..... | 9 |
| 4.2 | Consulting with injured or affected person(s)..... | 10 |
| 4.3 | Making the decision..... | 10 |
| 5 | Further information..... | 11 |
| 6 | Definitions..... | 11 |
| 7 | References..... | 11 |

1 Introduction

1.1 Purpose

This guideline provides an overview of the requirements and process for proposing an 'enforceable undertaking' (EU) under Part 10.1A of the Heavy Vehicle National Law (HVNL). This document also briefly outlines the evaluation criteria and process the National Heavy Vehicle Regulator (NHVR) (the Regulator) applies to evaluate and make a decision regarding an EU proposal.

1.2 Scope

This guideline applies to the preparation, submission and evaluation of all EU proposals prepared by a person or legal entity (the Promisor) as an alternative to prosecution, for their alleged contravention under the HVNL.

The intent and guiding principles the NHVR applies to determine the circumstances in which it will accept an EU as an alternative to prosecution, are outlined in the *Enforceable Undertakings Policy*.

2 About enforceable undertakings

2.1 Defining enforceable undertakings

An EU is a written statutory undertaking or agreement by a person or legal entity:

- that proposes an 'alternative to prosecution' for their alleged contravention under the HVNL
- that is entered into voluntarily to take specified steps to address shortfalls in their compliance
- where the alleged offender can demonstrate to the NHVR their ability to effect profound reform of their transport activities, by implementing effective measures to improve the management of public risks and benefit the community, in ways not able to be achieved by other sanctions.

An EU imposes substantial ongoing obligations and is not a suitable sanction for minor or trivial offences.

2.2 The nature of undertakings

Enforceable undertakings allow more flexible and broad outcomes than those available through prosecution in the courts. The outcomes may include, but are not limited to, a combination of the following possible strategies:

- conducting, facilitating, or funding research into a heavy vehicle transport safety issue relevant to the industry
- implementing specified projects, such as special training programs to address particular needs for drivers, other heavy vehicle transport workers, management, executives, and supply chain partners
- conducting promotional and education campaigns targeted to heavy vehicle transport and supply chain sectors
- targeted publicity regarding the alleged contravention
- employing and/or funding heavy vehicle transport safety expertise within the workplace and/or industry sector
- community service commitments, such as implementing a heavy vehicle transport industry-wide awareness program or publication of material dealing with the enforceable undertaking in relevant transport journals, publications, or newspapers
- donating funds to a not-for-profit organisation with a specific focus on heavy vehicle transport safety, including short, medium, and long-term objectives
- assisting in, or funding, the development of heavy vehicle transport industry standards or codes of practice
- funding tertiary scholarships for students conducting research into aspects of heavy vehicle transport safety in consultation with relevant universities
- other initiatives that achieve similar outcomes.

2.3 Acceptance of undertakings

2.3.1 Investigations and court proceedings

- The NHVR may accept an undertaking at any time before the proceedings for an alleged contravention are finalised.
- Except in extraordinary circumstances, the NHVR will not consider accepting an EU until an investigation is finalised and a determination has been made about the appropriate charges and the person or persons to be charged.
- Ordinarily, the NHVR will not consider accepting an EU until charges have been laid. In any event, investigation and prosecution may continue until such time as an EU is accepted.

2.3.2 Category 1 offences

NHVR will not accept an EU for a Category 1¹ offence.

For incidents where there has been a death or very serious injury, but where the Category 1 offence has not been made out, a request to enter an EU would be accepted only in exceptional circumstances. The Promisor would have to demonstrate that by their undertaking, they deliver benefits to injured or affected persons, to the workplace, industry and the wider community that would not be achieved in the normal course of prosecution.

2.3.3 Other circumstances

Other circumstances where it is unlikely that an EU would be accepted:

- where a death, or very serious injury, has occurred
- for minor offences
- where a prosecution has not been commenced
- where a trial has been held
- if the person proposing the EU has previously been convicted of:
 - an offence against ss 26F, 26G or 26H of the HVNL
 - a breach of a safety duty, however described, under Work, Health and Safety (WHS) legislation of a state, territory, or the Commonwealth
 - a failure to comply with an EU, either under the HVNL, or another law of a state, territory, or the Commonwealth
 - an offence under Division 2 of Chapter 13 of the HVNL, or an offence involving fraud or dishonesty punishable on conviction by imprisonment of six months or more
 - any other offence, however described, involving the death, serious injury or illness of any person involved in that person's business or undertaking.

Each proposal is considered on its merits however, and the NHVR exercises a broad discretion after having taken into account relevant factors.

2.4 Benefits and costs of entering an undertaking

Apart from the obvious benefit of avoiding prosecution, entering an EU provides several advantages to a person or entity:

- improved safety in the workplace, industry, and community
- greater employee protection
- enhanced reputation.

However, a decision to pursue an EU should not be taken lightly. The obligations that form the undertaking are substantial, on-going and may incur several times the fines and costs of a court determination.

¹ Section 590A(1) HVNL. A Category 1 offence (as defined in s 26F, HVNL) applies where a party has a primary duty and without a reasonable excuse, engages in conduct that exposes an individual to a risk of death or serious injury or illness, and is reckless to the risk.

3 Submitting a proposal

3.1 Initiating an undertaking

An EU is a voluntary promise. The proposal may arise as a result of a discussion between the party and the NHVR.

Before charges

If charges have not been laid, discussions should be limited to Executive Director, Statutory Compliance.

Charges are before the court

If the investigation has finalised, and charges have been laid discussions may occur between the Prosecutions Team and the Promisor.

Under no circumstances will the NHVR assist with the drafting of an EU. This must be done by the person, or their legal representative, at their own expense.

Signatories to a proposed EU under the HVNL should be aware that submission of a proposed EU does not guarantee acceptance. Where a proposed undertaking is not accepted, the NHVR will not rely on the proposal as an admission against interest in a subsequent prosecution.

Where there is uncertainty about whether there would be any likelihood of an undertaking being accepted – because of the Promisor’s prior compliance history for example – a preliminary enquiry may be made.

3.2 Contents of the undertaking

An EU comprises two sections: ‘general information’ and ‘enforceable terms’. It must be in the approved form—an [Enforceable Undertaking \(EU\) template](#) is available.²

3.2.1 General information

The general information provides the Regulator with background information on the person and relevant matters surrounding the contravention. The Regulator may verify information that has been set out in the EU.

An EU must include the following general information:

- Details of:
 - the person proposing the EU
 - the alleged contravention
 - the events surrounding the alleged contravention (for example, incident details)
 - any injury or financial loss that arose from the alleged contravention
 - any notices issued that relate to the alleged contravention
 - any existing transport safety management systems at the workplace including the level of auditing currently undertaken
 - any consultation undertaken within the company regarding the proposal of an EU
 - any current or previous undertakings held by the defendant or corporate defendant.
- A statement:
 - of assurance about future HVNL compliance
 - of regret that the incident occurred (i.e. not an admission of guilt)
 - of ability to comply with the terms of the EU
 - granting the NHVR a licence to use the person’s intellectual property developed as part of the EU.
- An acknowledgement that the NHVR has alleged a contravention has occurred
- When an alleged contravention is associated with an injury/illness, details of the:

² 590A(3) HVNL

- type of workers compensation provided (if the injured person is a worker of the person)
- support provided, and proposed to be provided, to the injured person to overcome the injury/illness
- Any rectifications made as a result of the alleged contravention.
- An acknowledgement that the EU will be published and may be publicised.
- Where a term involves a donation, details of the relationships held with any beneficiaries and details of how the reason for the donation will be communicated to the beneficiary.

The person may be required to complete a statutory declaration outlining details of any prior HVNL or WHS convictions, convictions for dishonesty or entry into another EU. This information will not be published in the EU but will be used as part of the EU evaluation process.

3.2.2 Enforceable terms

The EU must set out enforceable terms, which the person will be accountable for completing.

| | |
|--------------|--|
| Note: | Conditions of the EU must be directed towards improvements in heavy vehicle safety, redress of damage or injury and long-term community benefit. |
|--------------|--|

Each of the terms must be relevant, achievable, and clearly defined with a way to assess or measure whether the obligation has been carried out.

Where possible, all terms are to have a nominated cost and timeframe for delivery.

Where delivery will be progressive, the term should include interim goals. For example, ‘25% of staff to be trained in a new system within three months, 50% within six months’ etc.

An EU must include the following enforceable terms:

- A commitment:
 - that the behaviour that led to the alleged contravention has ceased and will not reoccur
 - to the ongoing effective management of public risks associated with transport activities
 - to disseminate information about the EU to workers and other relevant parties in the chain of responsibility and in its annual report (if applicable)
 - to participate constructively in all compliance monitoring activities of the EU
 - that any promotion of a benefit arising from the EU will clearly link the benefit to the undertaking and make clear that the undertaking was entered into as a result of an alleged contravention.
- Strategies within time frames that will deliver:
 - benefits to drivers and parties in the chain of responsibility
 - transport industry benefits
 - community benefits—Proposed initiatives must focus on delivering transport safety outcomes within the community, rather than merely being a general financial donation that can be used as the recipient determines.
- Where appropriate in the circumstances, a commitment to:
 - establish and maintain (or maintain if a system already exists) a transport safety management system, acceptable to the NHVR, that meets the principles of *AS/NZS 4804:2001 Occupational health and safety management systems – general guidelines on principles, systems and supporting techniques*
 - ensure the transport safety management system is audited by third party auditors that meet the principles of *AS/NZS 4801:2001 Occupational health and safety management systems-specification with guidance for use as set by the NHVR*
 - provide a copy of each finalised transport safety management system audit report to the NHVR, along with a letter certifying that the report has not been altered from the copy provided by the transport safety management system auditor
 - implement the recommendations from the audits (unless otherwise negotiated with the NHVR).

3.2.3 Unacceptable inclusions

An EU must not include:

- a denial of liability (it also need not include an admission of liability).
- any terms which may set up defences for possible non-compliance with the EU.
- any terms which may set up defences for possible future contraventions of the HVNL, or any relevant Work Health and Safety Act of a state, territory, or the Commonwealth.
- any terms that may impose an obligation on the NHVR or any other person without the person's consent.

Note: Performance of the conditions should not cause expense or inconvenience to the NHVR. In particular, any monitoring conditions included in the terms of an EU should be at the Promisor's expense.

3.3 Finalising the proposal

To finalise the proposal, ensure the above general information and enforceable terms are set out as defined in sections 3.2.1 and 3.2.2 of this guideline.

Before submitting the EU proposal:

- Number each paragraph – this ensures the information provided may be cross referenced with the terms of the EU during the evaluation process
- Ensure all personal details such as names and references to gender are removed, with terms such as 'supervisor', 'manager', 'worker', and 'injured person' used instead.
- Include the version number, date, and page number on each page.
- Ensure the EU proposal is signed by the person, or a duly authorised person. By signing the proposed undertaking, the person agrees to comply with the terms. A proposed undertaking will not progress to evaluation or be considered unless it has been signed.
- Submit the EU proposal to:

*Director Prosecutions Statutory Compliance
National Heavy Vehicle Regulator PO Box 492
Fortitude Valley QLD 4006*

Note: All responsibility for the content of the EU rests solely with the person giving the undertaking. Prior to the NHVR accepting a proposed EU, the person can withdraw or vary it.

3.4 Varying or withdrawing an undertaking

A person may withdraw or vary a proposed EU before it has been accepted. Once accepted, an EU may only be withdrawn or varied with the written agreement of the NHVR.

The NVHR will not agree to a variation that describes a different contravention than that alleged.

4 Evaluating the proposal

4.1 Evaluation criteria

The NHVR will evaluate the proposed EU with regards to its compliance with the following criteria:

- the nature and extent of the act or omission alleged
- the person's compliance history
- whether the EU delivers benefits to the public beyond the Promisor's compliance with the law, the quality of the strategies proposed and the extent to which they are likely to achieve measurable improvements in heavy vehicle transport safety. This may include:
 - the implementation of training offered to staff and other stakeholders. (Where changes or training are proposed, it must be related to the relevant regulatory guidance (the *Master Code*, *Load Restraint Guide*, Australia Standards etc.) and any training provider must be accredited and approved by the NHVR)

- durable benefits like training and tools, and development of manuals and/or guides
- resulting publications and intellectual property to be captured by Creative Commons copyright licenses to ensure benefits can be shared with the broader transport community
- the likely improvements in safety within the Promisor's business or operations. This may include:
 - the implementation of systems, procedural and/or policy change(s) to manage risk
 - any rectifications made to systems, procedures and/or policy to minimise future public risk, made as a result of the identified contraventions.
- the person's ability, including their financial ability, to meet the terms of the proposed EU
- the significance of the commitment compared to the capability of the person, and an expression of regret and culpability for the offending conduct
- the support the person has provided, and has committed to provide into the future to an injured or affected person(s)
- input from injured and affected persons
- the extent to which the total value of the proposed activities exceeds the reasonable expectations of a court outcome
- reports or assessments of investigating or prosecuting agencies who have had conduct of the matter.

It is essential the activities proposed in any EU have a sufficient degree of specificity and measurability to ensure accountability and transparency. Reporting to the NHVR on the completion and success of proposed activities must be a component of any undertaking.

The evaluation will rely upon the information provided in the proposed EU. The information provided in the proposed EU may be subject to verification by the NHVR.

The NHVR may take into account any other relevant information when evaluating the proposal, including the opinions of safety management or other relevant experts.

4.2 Consulting with injured or affected person(s)

The evaluation process will normally include consultation with persons who were injured or substantially affected by the alleged contravention. The NHVR will consult the persons who were injured or affected, to clarify the following areas:

- the incident
- the Promisor's conduct prior to the incident
- any changes the Promisor has already made to their transport activities since the incident
- any assistance the Promisor has provided to improve an injured person's quality of life since the incident
- direct and indirect financial loss of an affected person as a result of the incident
- the person's views on whether an EU would be an acceptable alternative to the matter being addressed through legal proceedings
- any other relevant matter.

Note: While the views of injured and affected person(s) are given due weight and consideration, the final decision rests with the NHVR.

4.3 Making the decision

The decision to accept an EU rests solely with the NHVR Chief Executive Officer (CEO) or the CEO's delegate.

An EU becomes enforceable only when accepted by the NHVR CEO (or their delegate). The NHVR must publish on their website a promisee's decision to accept an EU, along with reasons for the decision.

Once an EU has been accepted, it can only be withdrawn or varied with the written agreement of the NHVR. However, the provisions of an EU cannot be varied to provide for a different alleged contravention.

The NHVR CEO (or their delegate) will advise the person in writing of the decision to accept or reject an EU, along with reasons for the decision.

5 Further information

Further information can be obtained by contacting the Director Prosecutions, Statutory Compliance, National Heavy Vehicle Regulator in writing:

- by post:
 - Director Prosecutions*
 - Statutory Compliance*
 - National Heavy Vehicle Regulator*
 - PO Box 492*
 - Fortitude Valley QLD 4006*

or

- by email:
 - prosecutions@nhvr.gov.au

6 Definitions

The following terms are specific to this guideline.

| Term | Definition |
|---------------------------------|---|
| Affected person | Family members of injured or deceased persons; persons who suffer substantial financial harm as a result of the contravention; family members of persons who suffered substantial financial harm. |
| An HVNL enforceable undertaking | A written undertaking proposed by a person or legal entity as an alternative to prosecution for an alleged contravention. |
| Category 1 offence | As defined in s 26F of the HVNL. |
| The Promisor | The company or entity that enters into an enforceable undertaking. |
| The Regulator | The National Heavy Vehicle Regulator (NHVR). |
| Very serious injury | An injury that has caused nervous system damage liable to lead to mental incapacity or permanent restriction of mobility or involves a major amputation of a limb or parts of the body – for example, amputation above the knee or elbow. |

7 References

- Heavy Vehicle National Law Act 2012*
- Policy - Enforceable Undertakings*
- AS/NZS 4804:2001 - Occupational health and safety management systems - general guidelines on principles, systems and supporting techniques*
- AS/NZS 4801:2001 - Occupational health and safety management systems - specification.*