

30 March 2023

Our Reference: 6960

Mr Anthony Kuschert

[REDACTED]
[REDACTED]
[REDACTED]

Dear Mr Kuschert

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 Mr Anthony Kuschert (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's (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. It is alleged that on 11 January 2023 Mr Kuschert drove a heavy vehicle, namely a Western Star 4900 FX prime mover towing a trailer, on the Bells Line of Road at Bell NSW that did not comply with the dimension requirements.
4. The vehicle's constructed width was 2.49m and its load is not permitted to be more than 150mm past the outer extremity of the heavy vehicle on either side, being a total width of

¹ Enforceable Undertaking proposed by Mr Kuschert pursuant to Chapter 10.1A of the HVNL dated 23/03/2023.

2.64m. The vehicle's width was measured at 2.84m. The vehicle's alleged width was 200mm in excess of the permissible width. The contravention of the vehicle's permitted width resulted in a severe risk breach.

5. Mr Kuschert drove the vehicle, loaded with hay bales, from Bylong (approximately 168km). He has stated that the hay bales were compliant with the dimension requirements when it was loaded at a farm in Bylong. However, during his journey another heavy vehicle cut him off causing him to swerve off the road. This caused his load to shift to one side of the vehicle causing the load projection.
6. The NHVR commenced a prosecution against Mr Kuschert alleging the contravention. The maximum penalty available for the offence is \$11,820.

The Proposed Enforceable Undertaking

7. The EU proposal comprises three (3) initiatives to be completed within six (6) months from the date of the NHVR's acceptance of the EU and amounts to a total estimated cost of \$1,000.00.
8. The three initiatives can be summarised as follows. Mr Kuschert undertakes to:
 - a. complete a Chain of Responsibility course;
 - b. complete a Training & Loading Restraint course; and
 - c. make a donation to Road Trauma Support NSW.

Criteria to be applied

9. 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; and (11) reports or assessments of investigating or prosecuting agencies who have conduct of the matter.
10. With regards to criteria (1) and (2), I have considered the nature and extent of the conduct alleged and Mr Kuschert's compliance history. I acknowledge that prior to these allegations, I am

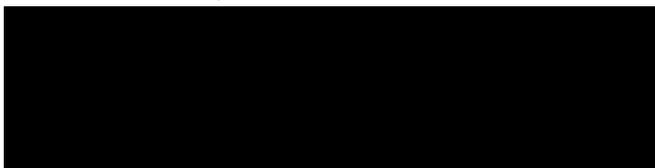
not aware of any convictions of the HVNL or any breaches of related safety duties by Mr Kuschert.

11. With regards to criteria (3) and (4), I have considered that the EU proposal initiatives do benefit the public beyond the compliance of the law, are of good strategic quality, and do have potential to make noticeable positive change in the transport industry in terms of implementation of safety measures.
12. With regard to criteria (5), I acknowledge the proposal initiatives are likely to improve Mr Kuschert's Ltd's transport operations.
13. With regards to criteria (6), I acknowledge that Mr Kuschert has the ability to meet the terms of the EU proposal.
14. With regards to criteria (7), I have considered that Mr Kuschert has taken into account the significance of the EU commitment, compared to his capability.
15. 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.
16. 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

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

Yours sincerely



Sal Petrocitto

Chief Executive Officer