

Enforceable Undertakings

Purpose

This policy outlines the intent and guiding principles the National Heavy Vehicle Regulator (NHVR) applies to determine the circumstances in which it will accept, as an alternative to prosecution, an 'enforceable undertaking', as defined in Part 10.1A of the Heavy Vehicle National Law (HVNL).

An enforceable undertaking (EU) is a high-level statutory agreement that will only be used as an alternative to prosecution where the alleged offender 'Promisor' can demonstrate to the NHVR their ability to:

- undertake organisational reform
- implement effective safety measures for transport activities.

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

Note: EU are entered into voluntarily and involve operators agreeing to take specified steps to address shortfalls in their compliance.

Scope

This policy applies to any consideration by the NHVR of whether to accept an EU under Part 10.1A of the HVNL.

Policy statement

The NHVR will only accept an EU as an alternative to prosecution where the alleged offender demonstrates an ability to effect profound reform of their activities to improve safety and to benefit the community in ways not able to be achieved by other sanctions.

Principles

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

Initiating an enforceable undertaking

1. The NHVR will not suggest or solicit the EU. An EU is a voluntary promise and may only be initiated by the party to which it applies and not by the NHVR. The proposal may arise as a result of a discussion between the party and the NHVR, but the NHVR must not suggest or solicit the undertaking.
2. 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.

3. The NHVR will provide guidance to parties who wish to propose an EU in the *Guideline – Proposing an Enforceable Undertaking* (the Guidelines).

Accepting or rejecting an enforceable undertaking

4. An EU can only be accepted or rejected by the NHVR Chief Executive Officer (CEO) or their delegate.
5. The NHVR may accept an undertaking at any time before the proceedings for an alleged contravention are finalised.
6. 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.
7. 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.
8. The NHVR cannot accept an EU for an alleged contravention of s. 26F of the HVNL.
9. Other than in exceptional cases, the NHVR will not accept an EU in 'other' specific circumstances. These circumstances are listed in the *Other circumstances* section in the Guidelines.

Complying with the Guidelines

10. The NHVR will ensure:
 - a. a proposed EU complies with the Guidelines
 - b. conditions of the EU are directed towards improvements in heavy vehicle safety, redress of damage or injury and long term community benefit
 - c. the Promisor's obligations are clearly described and objectively measurable
 - d. performance of the conditions does not cause expense or inconvenience to the NHVR
 - e. any monitoring conditions included in the terms of an EU are at the Promisor's expense.

Publishing information

11. The NHVR will publish on its website any decision to accept an EU and the reasons for the decision
12. The NVHR will also publish information about the Promisor's compliance with the obligations in the EU.

Evaluating the proposal

13. The NHVR will evaluate the proposed EU with regard to its compliance with the specific *evaluation criteria* listed in the Guidelines.
14. The information provided in the proposed EU may be subject to verification by the NHVR.
15. The NHVR may take into account any other relevant information when evaluating the proposal, including the opinions of safety management or other relevant experts.

Consulting with injured or affected person(s)

16. The NHVR will normally include in the evaluation process, consultation with persons who were injured or substantially affected by the alleged contravention.
17. The NHVR will consult the persons who were injured or affected, to clarify the areas listed in the *Consulting with injured or affected person(s)* section in the Guidelines.

Making a decision to accept or reject a proposal

18. An EU takes effect when accepted by the NHVR.
19. 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.
20. If an EU is not accepted, legal proceedings against the person will continue.

Varying or withdrawing an undertaking

21. 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.
22. The NVHR will not agree to a variation that describes a different contravention than that alleged.

Responsibilities

The following positions are responsible for implementing this policy.

Position	Responsibilities
Chief Executive Officer (CEO)	<ul style="list-style-type: none"> • Accepts or rejects the enforceable undertaking.

Position	Responsibilities
Executive Director, Regulatory & Legal Services	<ul style="list-style-type: none"> • Considers the advice from the Principal Prosecutor following the evaluation. • Provides a recommendation to the CEO about whether to accept or reject the EU.
Investigator	<ul style="list-style-type: none"> • Refers initial enquires from a person about proposing an EU to the Principal Prosecutor. • Provides the person with the <i>Guideline – Proposing an enforceable undertaking</i> (the Guidelines). • Provides the Principal Prosecutor with such assistance as they may require to conduct the evaluation of any proposed EU, including verification of any information contained in the EU.
Principal Prosecutor	<ul style="list-style-type: none"> • Conducts the evaluation of any proposed EU. • Provides a detailed advice to the Executive Director, Regulatory & Legal Services about the merits or otherwise of the proposed EU.

Definitions

The following terms are specific to this policy.

Term	Definition
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.
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.
The Promisor	The company or entity that enters into an enforceable undertaking.

Related legislation and documents

- *Heavy Vehicle National Law Act 2012*
- *Guideline – Proposing an enforceable undertaking (the Guidelines)*
- *Policy – Prosecution*
- *Manual – Prosecution.*