

# Enforceable undertakings

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*PRACTICE GUIDE*

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Enforceable undertakings are an alternative to prosecution when a duty holder has breached (including an alleged breach) the *Health and Safety at Work Act* (HSWA).

It is a way for a duty holder to voluntarily make a binding agreement with WorkSafe New Zealand to take action for the breach they have made.

This document provides additional information on the process and should be read in conjunction with the *Enforceable undertakings operational policy*.

## Registering interest

Any duty holder seeking an enforceable undertaking must first register their interest with WorkSafe.

This must be sent to the Enforceable Undertakings Team (the EU Team) via the enforceable undertakings email address: [EnforceableUndertakings@worksafe.govt.nz](mailto:EnforceableUndertakings@worksafe.govt.nz)

An expression of interest can be submitted at any time following the breach (including an alleged breach). It is non-binding on both parties. The registration of interest must clearly state:

- that an enforceable undertaking is being sought
- who is seeking the undertaking, and
- the breach or event that the undertaking is being sought for.

The EU Team will acknowledge, by return email and within one business day, all registrations of interest. It is important to note that even if a duty holder registers interest in possibly pursuing an enforceable undertaking:

- the enforceable undertaking process will not begin until the investigation into the breach is complete, and
- legal proceedings will continue until the outcome of any enforceable undertaking application is finalised.

## Section 47 review

Once the investigation is complete, WorkSafe will conduct a legal review of the file to consider whether we believe the breach amounts to an offence under section 47 of HSWA. This is an offence of reckless conduct in respect of a duty that exposes an individual to a risk of serious injury, serious illness or death.

This is the most serious offence under HSWA and the maximum penalties include imprisonment. WorkSafe cannot accept an enforceable undertaking if we believe that the breach amounts to an offence against section 47 of HSWA.

The EU Team will advise the duty holder in writing via the enforceable undertakings email if WorkSafe decides that the breach amounts to a section 47 offence.

The EU Team will not contact the duty holder if the breach does not amount to a section 47 offence. Instead, the file will automatically proceed to the next step, the suitability assessment.

## The suitability assessment

The EU Team will apply the suitability assessment once the section 47 review is complete. This assessment considers whether an enforceable undertaking is a suitable outcome given the specific circumstances of a breach.

The EU Team will consider the breach against a number of measures. It is unlikely that an enforceable undertaking will be accepted for any breach that meets two or more of the following measures:

### Did it result in a fatal injury or illness?

A fatal injury is one that causes the death of an individual. A fatal illness is one that causes, or will cause, the death of an individual.

### Was there the potential for the breach to result in multiple fatalities or for multiple victims to develop a fatal illness?

The breach had the potential to have fatal health and safety consequences for multiple people and may even have had the potential to affect people beyond the facility boundary.

### Does the breach have any aggravating factors?

These factors include:

- the risk of and potential for, illness, injury, or death that could have occurred
- whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred
- the degree of departure from prevailing standards in the sector or industry. This includes:
  - what the person concerned knows, or ought reasonably to know, about the hazard or risk and the ways of eliminating or minimising the risk, and
  - the availability and suitability of ways to eliminate or minimise the risk.
- the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

## Did it involve offending against a vulnerable victim(s)?

Offending means that the breach has harmed a vulnerable person (or people) or put them at risk.

A vulnerable person is someone who has little control over their situation and may be more easily harmed, affected or hurt. Examples of vulnerable people are children; members of the public; young or elderly workers; pregnant or breastfeeding mothers and migrant workers.

## Does it demonstrate repeat conduct by the person?

Records and/or evidence indicate that the person has a history of:

- related or similar harm and/or
- non-compliance leading to formal (statutory) enforcement that is recent, relevant and/or significant.

## Is an enforceable undertaking likely to be challenged by victim(s) (or their representative), union or employer organisation?

The victim(s), union or employer organisation has demonstrated a strong view against an enforceable undertaking.

## Could accepting an enforceable undertaking be received as contrary to a stated government priority or policy?

This includes the Government's Working Safer blueprint; the Letter of Expectations from the Minister for Workplace Relations and Safety; WorkSafe's Statement of Performance Expectations and broader priorities to which WorkSafe contributes, including:

- responsibly managing the Government's finances
- building a more competitive and productive economy
- delivering better public services to New Zealanders, and
- supporting the rebuilding of Christchurch.

After the EU Team applies the suitability assessment, it will advise the duty holder in writing via the enforceable undertakings email that WorkSafe is ready to consider an application.

If the EU Team has determined that the breach meets two or more of the measures, they will also advise the duty holder in writing that it is unlikely an enforceable undertaking will be accepted.

They will also tell the duty holder which measures were deemed to have applied.

The duty holder can still choose to submit an application regardless of the outcome of this assessment.

## Submitting an application

Submitting an application does not form a commitment on the part of WorkSafe to enter into an agreement.

Duty holders must submit their application on the enforceable undertakings application form. It must be sent to the EU Team via the enforceable undertakings email. There is no application fee.

The EU Team will provide written acknowledgement they have received an application via return email within one business day.

All applications for an enforceable undertaking must:

- include commitments that would 'raise the bar' or promote progressively higher standards of work health and safety in the given sector or industry for the benefit of one or more of the following:
  - the workers and/or work and/or workplace
  - the wider industry or sector
  - the community
- account for the benefits that accrue to the duty holder by the prosecution not proceeding. This includes avoiding a conviction and other sentencing outcomes
- indicate whether the duty holder has undertaken enquiries with any applicable union and within their sector/industry about the proposed measures and what feedback was received
- include appropriate amends for any victim(s) (monetary or otherwise)
- indicate whether the duty holder has had contact with the victim(s) about the proposed actions and measures and what feedback was received
- acknowledge the underlying conduct or failures that have given rise to the breach.

Examples of what could be considered a benefit could include (but is not limited to):

- conducting, facilitating or funding research into a safety issue relevant to the industry
- implementing specified projects, such as special training programs to address particular needs for workers, supervisors and management
- promotion and education campaigns targeted at various sectors
- targeted publicity regarding the breach and/or how it could have been prevented
- employing and/or funding work health and safety expertise within the workplace and/or industry sector

- community service commitments, such as implementation of an industry-wide awareness program or publication of material dealing with the EU in relevant trade journals or newspapers
- donating funds to a not-for-profit organisation with a specific focus on work health and safety including short, medium and long term objectives assisting in, or funding, the development of industry standards relevant to the person's industry
- funding tertiary scholarships for work health and safety students in consultation with relevant universities.

Irrespective of having received a registration of interest or an application, WorkSafe will continue with its investigation, the enforcement decision-making process and/or any legal proceedings as an independent but parallel process.

This means that we will endeavour to determine an application before the 12-month time-frame for filing charges, but if this is not possible we may proceed with filing charge(s). Any decision to withdraw charges will be made when a decision is made on the enforceable undertaking application.

WorkSafe will take all reasonable steps to adjourn any court proceedings until such time as a decision has been made. However, adjournments will only be sought where there is a genuine commitment to entering into an enforceable undertaking. Adjournments will not be sought or agreed to where they are being used as delaying tactics.

### Considering an application

The threshold for accepting a proposed enforceable undertaking is a high one.

The Enforceable Undertakings Panel will consider the application and make a recommendation about it. To have any chance of being accepted, an application must demonstrate that the proposed enforceable undertaking constitutes a proportionate enforcement outcome. This will be considered using the following factors:

#### The nature of the proposals in the application and the benefits that would be realised to the health and safety system from them

This includes (but is not limited to):

- the value proposition of the application
- how the actions promote progressively higher standards of work health and safety. This means commitments that would 'raise the bar' or promote progressively higher standards of work health and safety in the given sector or industry
- which groups will realise the benefits of the proposals.

#### The nature of the duty holder's breach and how serious it was

This includes (but is not limited to):

- the significance and seriousness of the breach (including whether it is of a nature that requires the transparency of a court hearing, in the public interest)
- the injuries, or risk of injury, as a result of the breach
- the prevalence of the risks arising from the breach.

#### Information received from any interested party in relation to the alleged misconduct

This includes (but is not limited to):

- information about the incident, views on health and safety management at the workplace, the victim(s) recovery from the injury and their likely future work prospects
- whether any offer of amends has been made, or paid, in relation to the harm suffered and the victim(s) views about the adequacy of that offer
- whether any offer has been made for the victim(s) to participate in a restorative justice type process, and their views about this
- input from worker representatives (Health and Safety Representatives and unions) if applicable.
- the victim(s) views as to whether an enforceable undertaking would be an acceptable alternative to other enforcement alternatives
- while they do not have a right of 'veto', the views of the victim(s) are important and will be actively considered.

#### Mitigation and remedial action already taken, or planned, by the duty holder regarding both the breach and any person affected by it (including victims)

This includes (but is not limited to):

- steps taken by the duty holder to ensure a further breach does not occur in future (over and above merely achieving compliance with the legislation)
- commitment that the behaviour that led to the breach has ceased and will not reoccur
- commitment to the ongoing effective management of work health and safety risks
- commitment to disseminate information about the EU to workers and other relevant parties
- financial payments made to the victim(s)
- other help or support provided to the victim(s)
- information regarding the rehabilitation programmes, and the victim(s) quality of life since the incident where relevant

- information regarding retraining of the victim(s) where relevant
- actions taken to address any deficiencies in health and safety management in relation to the breach.

### The duty holder's past performance and history of compliance with health and safety legislation

This includes (but is not limited to):

- the duty holder's safety record
- any aggravating circumstances which exist (eg specific knowledge about the hazard or risk)
- whether the regulator is satisfied with the prospects for ongoing compliance based on the person's past behaviour.

### Any likely outcome if the matter were dealt with by legal proceedings

This includes (but is not limited to):

- whether the application has accounted for the benefits that accrue to the duty holder by the prosecution not proceeding.  
This includes avoiding:
  - a conviction being recorded against the duty holder
  - any possible fine that may have been imposed
  - any other costs that may have been awarded to WorkSafe, and
  - any other sentencing outcome.

### How the proposal promotes WorkSafe's objectives and supports its strategic priorities

This includes (but is not limited to):

- whether the application supports any of WorkSafe's objectives and strategic priorities. This could include, but is not limited to priorities and objectives outlined in:
  - WorkSafe's statement of intent
  - the Minister's letter of expectations
  - Healthy Work strategic plan for work related health
  - Government's Working Safer blueprint
  - Maruiti 2025, and
  - WorkSafe's cross-organisational initiatives
- whether the duty holder is from a focus area sector as they are expected to do more in their application to promote the objectives or purposes of health and safety legislation.

### Any other matter which WorkSafe thinks relevant

This includes (but is not limited to):

- a commitment to participate constructively in all compliance monitoring activities of the undertaking
- a commitment from management to improving the health and safety culture within the business. This can include, but is not limited to:
  - defining health and safety responsibilities
  - sharing the health and safety vision across the organisation
  - creating an environment that holds everyone accountable for being visibly involved, especially managers and supervisors
  - improving worker participation within the organisation
  - encouraging incident reporting
  - creating and/or evaluating an incident investigation system to make sure investigations are conducted in an effective manner
- where WorkSafe considers appropriate in the circumstances:
  - the development and/or audit of Health and Safety Management Systems (HSMS). There will be situations where WorkSafe considers that an effective HSMS should be developed and implemented as part of the enforceable undertaking
  - in these situations the HSMS should be audited by an independent third party as part of the commitment
  - the person must commit to implementing recommendations from an audit unless otherwise negotiated by WorkSafe
  - if an HSMS is already in place, the undertaking must include a commitment to have that HSMS reviewed and amended as necessary.

In addition, and among other considerations, WorkSafe will not accept a proposed enforceable undertaking where it:

- contains a denial of responsibility for the breach
- does not contain a statement acknowledging that harm was caused or risked by the breach
- contains any clauses that may lead to possible non-compliance with the enforceable undertaking
- omits to include, or downplays, relevant details of the conduct which gave rise to the enforceable undertaking, and WorkSafe's concerns about the conduct

- contains any terms that may impose an obligation on WorkSafe or any other party without that party's consent
- only contains commitments that would equate to the duty holder meeting their existing obligations under Health and Safety legislation.

Taking into account the above factors, the Enforceable Undertakings Panel will recommend an application be accepted or declined.

The Enforceable Undertakings Panel can choose to refer the application back to the duty holder with feedback and a request they re-submit. However, this is not mandatory and is completely at WorkSafe's discretion. The duty holder should not assume that they will get an opportunity to amend their application and should submit their best application the first time.

The EU Team will advise the duty holder in writing about WorkSafe's decision via the enforceable undertakings email. This will include the reasons for the decision.

If the decision is made to decline an application, the duty holder will have an opportunity to make a submission to WorkSafe. This submission must be made in writing via the enforceable undertakings email and should only address the reasons given by WorkSafe for the decision. Any new or different terms proposed by the duty holder, or a new application, will not be considered. WorkSafe will then decide whether or not to confirm the decision to decline.

If WorkSafe accepts an application, then any legal proceedings taken against the duty holder will be discontinued. If the application is declined, then legal proceedings will continue.

WorkSafe expects the duty holder to co-develop and agree a communications protocol. This includes agreeing to a joint public statement to be released immediately following the acceptance of an enforceable undertaking.

Further Information about the decision making process is provided in the Enforceable Undertakings Policy.

## Costs

If an application is accepted, WorkSafe will generally seek agreement from the duty holder to pay the following costs associated with the undertaking:

- administrative costs associated with the breach and proposed undertaking
- legal costs associated with the breach and proposed undertaking
- compliance monitoring costs, and
- publication costs.

These costs will be recovered by way of a fixed charge of \$10,300 (GST exclusive). This means that the same set amount will be applied to all EUs. This charge is only payable if your application is accepted. Details about how the charge has been calculated are attached at Appendix One.

Any agreement to pay WorkSafe costs will be included in the enforceable undertaking.

The EU Team will provide an invoice to the duty holder after the undertaking is accepted and published.

## Monitoring the enforceable undertaking

### Monitoring

Once an enforceable undertaking is accepted, the EU Team will set up a monitoring schedule. This will include an agreed timeframe for completion of the enforceable undertaking.

The purpose of the monitoring schedule is to ensure the enforceable undertaking is meeting its stated targets and objectives. It enables WorkSafe to make an independent assessment of compliance against the key milestones throughout the life of the undertaking.

All proposed enforceable undertakings will be monitored by the EU Team. The duty holder will be responsible for satisfying WorkSafe that they are fulfilling the terms of the agreement and by providing timely reports and other evidence. WorkSafe may also include its own inspections and oversight into a schedule.

Monitoring schedules and timeframes will be set on a case by case basis based on the specific circumstances of, and actions detailed in, an enforceable undertaking.

WorkSafe may revise the monitoring schedule during the term of the undertaking if it receives information that would indicate different, or additional, compliance monitoring is appropriate. For example, in situations where there are further notifiable events or where routine inspections or assessments raise issues. If this occurs, WorkSafe will advise the duty holder in writing via the enforceable undertakings email.

Further Information about monitoring is provided in the Enforceable Undertakings Policy.

### Non-compliance

Enforceable Undertakings are legally binding. Failing to comply with an undertaking is an offence under section 126 of *HSWA*.

If the EU Team believes an enforceable undertaking has not been complied with, WorkSafe may investigate further. This may result in enforcement action.

Details about what could happen if court action is taken can be found in section 152 of HSWA and in the Enforceable Undertakings Policy.

If a duty holder breaches the terms of the enforceable undertaking, WorkSafe can choose to initiate legal proceedings for the original breach as well as for the breach of the undertaking. Any payments the duty holder has made regarding the enforceable undertaking will not be refunded.

## Variation

The duty holder can apply to vary the terms of an approved enforceable undertaking. The application must be made in writing via the enforceable undertakings email.

The decision about whether to vary an enforceable undertaking sits with WorkSafe. WorkSafe is not obligated to accept a variation request and will consider each on its merits. WorkSafe will only consider variations:

- that do not alter the spirit of the original undertaking and
- where there has been a material change in the duty holder's circumstances and/or
- if compliance with the terms of the undertaking has been later found to be impractical.

WorkSafe cannot vary an enforceable undertaking to reflect a separate breach of the Act (should one either later occur or come to light). This is prohibited by section 128 of HSWA.

In such circumstances, it is very unlikely that a separate enforceable undertaking would be accepted for the subsequent breach.

Should a request to vary an enforceable undertaking be received WorkSafe will contact the victim(s) and their views will be actively considered.

Further Information is provided in the Enforceable Undertakings Policy.

## Withdrawal

The duty holder can apply to withdraw from an enforceable undertaking. The application must be made in writing via the enforceable undertakings email.

WorkSafe is under no obligation to accept such requests, and will consider each on its merits.

Withdrawal will only be considered in exceptional circumstances. Where a withdrawal is agreed to, the person will no longer be bound by the terms of the enforceable undertaking and WorkSafe may decide to take legal action in relation to the original breach.

Further information is provided in the Enforceable Undertakings Policy.

Should a request to withdraw from an enforceable undertaking be received WorkSafe will contact the victim(s) and their views will be actively considered.

## Completion of the enforceable undertaking

The EU Team will decide when an enforceable undertaking is completed. This will be when they are satisfied that all of the agreed actions in the undertaking have been complied with.

The EU Team will advise the duty holder in writing via the enforceable undertakings email that the enforceable undertaking has been successfully completed.



## Appendix 1: Calculation of the fixed charge

WorkSafe will recover a number of costs associated with an EU on a fixed charge basis. The amount that will be sought is **\$10,300** (GST exclusive). This is rounded down from **\$10,324.08** which is comprised of:

- Administrative costs                      \$3659.50
- Legal costs                                      \$5125.58
- Compliance monitoring costs        \$1296.00
- Publication costs                              \$243.00

These amounts have been calculated as follows:

### a. Administrative costs                      **\$3,659.50**

Administrative costs are based on the estimated average number of hours it will take to complete each step of the EU process. These estimated averages are as follows:

EU PROCESS STEP	RESPONSIBILITY AND HOURS PER EU	COST PER EU
1. Registering interest	EU Team - 30 minutes	\$40.50
2. Section 47 review	<i>Considered under legal costs</i>	
3. Suitability assessment	EU Team - 4 hours	\$324.00
4. Submitting an application	<i>No cost to WorkSafe</i>	
5. Considering an application	EU Team - 15 hours	\$1,215.00
	EU Panel - 3 hours per person, 3 people	\$1,431.00
	EU Team Manager - 2 hours	\$356.00
	EU Decision Maker - 1 hour	\$212.00
6. Monitoring the EU	<i>Considered under compliance monitoring</i>	
7. Completing the EU	EU Team - 1 hour	\$81.00

### b. Legal costs                                      **\$5125.58**

The legal portion of the fee has been calculated by taking an average of the legal costs across all EUs received up to 5 September 2017.

### c. Compliance monitoring costs        **\$1,296.00**

Compliance monitoring costs are based on an estimated average of 8 deliverables per EU and 2 hours of EU Team time to monitor each deliverable.

### d. Publication costs                              **\$243.00**

Publication costs are based on an estimated average of 3 hours of EU Team time to prepare the necessary information to support publication of an EU.

### e. Hourly rate calculation

Per person hourly rates for the EU Team, EU Panel, EU Team Manager and EU Decision Maker have been made based on the following calculation:

*Salary band mid-point x a charge-out multiplier<sup>1</sup> of 1.65, divided into an hourly rate.*

<sup>1</sup> The charge-out multiplier covers overheads.



## Disclaimer

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