

# Enforceable undertakings

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*OPERATIONAL POLICY*

September 2019

This policy sets out WorkSafe's approach to enforceable undertakings under the Health and Safety at Work Act 2015 (HSWA). It will be used to guide WorkSafe's decision making about enforceable undertakings under HSWA.

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# 1.0 Introduction

## **IN THIS SECTION:**

**1.1** The purpose of this document

## 1.1 The purpose of this document

This document outlines how WorkSafe will deliver enforceable undertakings, specifically:

- When a duty holder can apply for an enforceable undertaking.
- The key stages of an enforceable undertaking, including:
  - how WorkSafe will carry these out, and
  - the criteria that will be applied at specific decision points.
- What happens if a duty holder does not comply with an enforceable undertaking.
- What WorkSafe's processes are for variations and withdrawals of an accepted enforceable undertaking.
- What costs may be recovered by WorkSafe in an enforceable undertaking.

This policy is not an operational guidance document. For that information, you will need to read the [Enforceable undertaking practice guide](#) on the WorkSafe website.

### RELATED POLICIES AND PROCEDURES

The enforceable undertaking policy should be read in conjunction with:

- [WorkSafe's Prosecution Policy](#)
- [WorkSafe's Enforcement Policy](#)
- [Part 4, sections 123-129 of the Health and Safety at Work Act 2015](#)
- [Enforceable undertaking practice guide](#)

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# 2.0

## The enforceable undertaking

### **IN THIS SECTION:**

- 2.1 What is an enforceable undertaking?
- 2.2 What are the key objectives of an enforceable undertaking?
- 2.3 What are the circumstances for applying?
- 2.4 What costs will be recovered by WorkSafe in an enforceable undertaking?

## 2.1 What is an enforceable undertaking?

An enforceable undertaking is an enforcement pathway that is permitted under Part 4 of HSWA. It can be taken following a contravention<sup>1</sup> of the Act.

It is one of a number of enforcement pathways that are available to WorkSafe with decisions made in line with the Enforcement Policy.

An enforceable undertaking allows a duty holder<sup>2</sup> to voluntarily enter into a binding agreement with WorkSafe and is generally used as an alternative to prosecution. It outlines actions the duty holder will undertake to address the contravention and is expected to deliver activities which meet the objectives outlined above.

An enforceable undertaking is not imposed on a duty holder. A duty holder must first express an interest and submit an application. WorkSafe then considers whether or not it agrees with the value proposition of the actions detailed in the application and whether it will accept or reject a proposed undertaking.

WorkSafe is not compelled to accept an application for an enforceable undertaking. However, once accepted, it is legally binding – the breach of an enforceable undertaking is a stand-alone offence under HSWA.

## 2.2 What are the key objectives of an enforceable undertaking?

The key objectives of an enforceable undertaking are to:

- Support progressively higher standards of work health and safety in a given industry or sector for the benefit of the:
  - workers and/or work and/or workplace
  - wider industry or sector, and
  - community.
- Provide acceptable amends to any victim(s).
- Support WorkSafe to meet its strategic priorities.

## 2.3 What are the circumstances for applying?

A duty holder can apply for an enforceable undertaking for any contravention of HSWA that may lead to, or has resulted in, a prosecution under the Act.

WorkSafe must not accept an enforceable undertaking for any contravention that it believes would amount to an offence against section 47 of HSWA (offence of reckless conduct in respect of duty).<sup>3</sup>

It is unlikely that WorkSafe will accept an enforceable undertaking if it does not pass the suitability assessment (refer to section 3, suitability assessment, for details).

The enforceable undertaking process has 7 broad steps. These are shown in figure. 1 on page 9.

<sup>1</sup> Refer to the definitions section.

<sup>2</sup> Refer to the definitions section.

<sup>3</sup> Refer to section 123 of the Health and Safety at Work Act 2015.



## **2.4 What costs will be recovered by WorkSafe in an enforceable undertaking?**

WorkSafe is currently reviewing its fee charging policy, and we will not be charging fees while this process is ongoing.

WorkSafe can recover costs in the event of a prosecution. These costs are outlined in [section 152](#) of HSWA.

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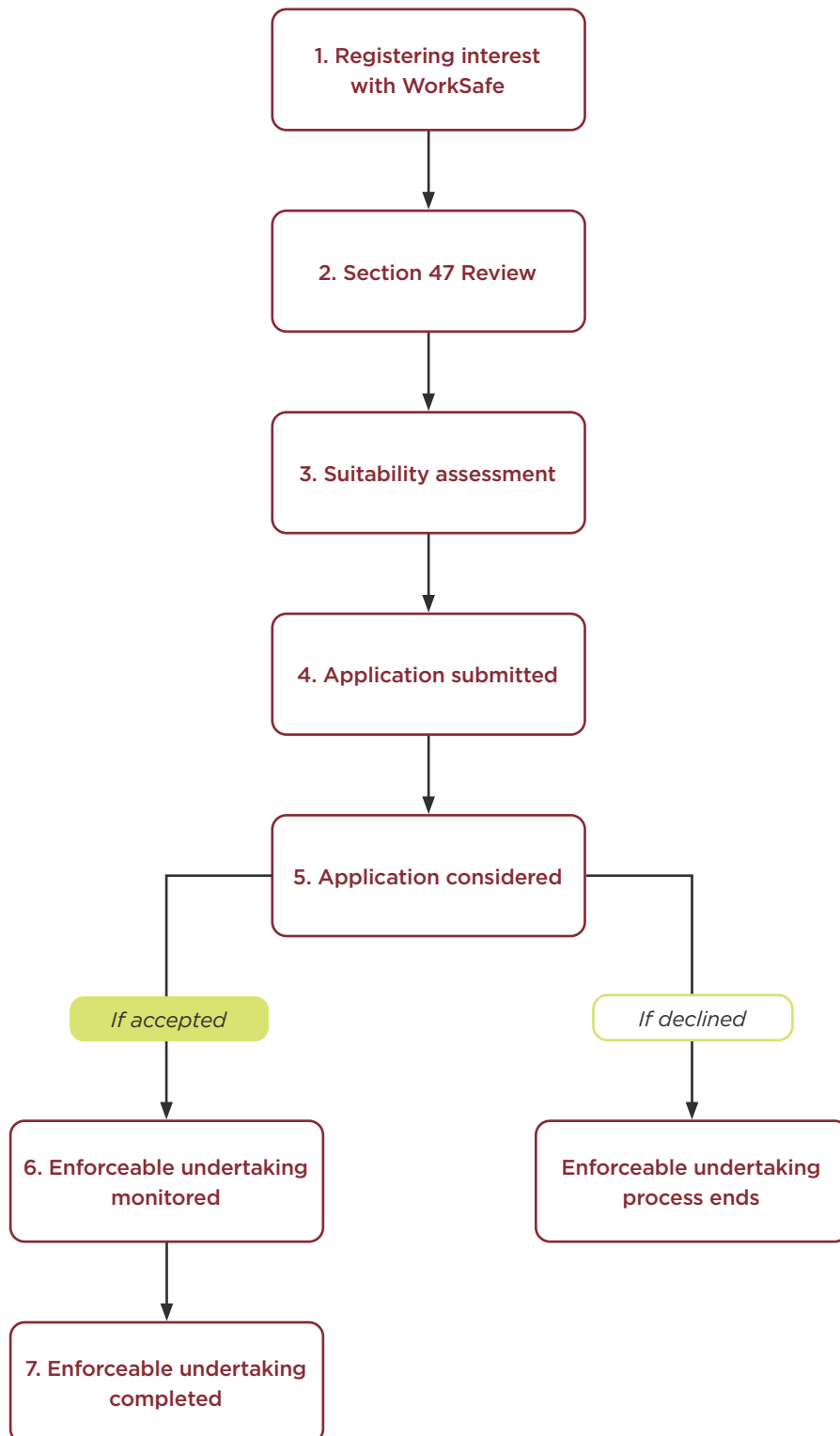
# 3.0

## The 7-Step Process

### IN THIS SECTION:

- 3.1 STEP 1: Registering interest with WorkSafe
- 3.2 STEP 2: Section 47 review
- 3.3 STEP 3: Suitability assessment
- 3.4 STEP 4: Submitting an application
- 3.5 STEP 5: Considering an application
- 3.6 STEP 6: Monitoring the enforceable undertaking
- 3.7 STEP 7: Completing the enforceable undertaking

### THE ENFORCEABLE UNDERTAKING PROCESS



**FIGURE 1:**  
The enforceable undertaking process

### 3.1 STEP 1: Registering interest with WorkSafe

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

A registration of interest must be made in writing to the WorkSafe Enforceable Undertakings Team (the EU Team).<sup>4</sup> The EU Team:

- administers the enforceable undertaking process
- provides an advisory function to the sector and within WorkSafe (including the WorkSafe New Zealand Board and the Minister for Workplace Relations and Safety), and
- monitors all accepted enforceable undertakings.

Interest can be registered at any time. However, WorkSafe will not progress the application until both the investigation and legal review have been completed.

Irrespective of having received a registration of interest, WorkSafe will continue with legal proceedings as an independent but parallel process.

### 3.2 STEP 2: Section 47 Review

Once the investigation is complete, we will conduct a legal review to determine if the contravention:

- justifies us proceeding with prosecution, and
- amounts to an offence against section 47 of HSWA (offence of reckless conduct in respect of duty).

We consider an investigation to be complete when the investigation file and report are complete, and any recommended changes have been endorsed.

We will let the applicant know whether or not we intend to proceed with prosecution.

If we believe the contravention amounts to a section 47 offence then we must not accept an enforceable undertaking. A contravention may amount to an offence against section 47 irrespective of whether or not a charge is filed under this section.

If the contravention does not amount to an offence against section 47, we will confirm whether or not the applicant wants to proceed with the application (irrespective of the prosecution decision).

If the applicant chooses to proceed, we will apply the suitability assessment.

### 3.3 STEP 3: Suitability assessment

WorkSafe will apply the suitability assessment. This assessment considers whether an enforceable undertaking is a suitable enforcement outcome given the specific circumstances of a contravention.

It is unlikely that WorkSafe will accept an enforceable undertaking for a contravention where it considers two or more of the following measures apply:<sup>5</sup>

- Did the contravention result in a fatal injury or illness?<sup>6</sup>
- Was there potential for the contravention to result in multiple fatalities or for multiple victims to develop a fatal illness?
- Does the contravention have any aggravating factors?
- Does it demonstrate repeat conduct by the duty holder?
- Did it involve offending against a vulnerable victim(s)?<sup>7</sup>

<sup>4</sup> Refer to the definitions section.

<sup>5</sup> Considerations for each criterion can be found in the [Enforceable undertakings practice guide](#)

<sup>6</sup> Refer to the definitions section.

<sup>7</sup> Refer to the definitions section.

- Is an enforceable undertaking likely to be challenged by a victim (or their representative), union or employer organisation?
- Could accepting an enforceable undertaking be perceived as contrary to a stated government priority or policy?

The EU Team will review the contravention, consider it against the measures and make an interim assessment. The EU Team Manager will give final approval of the assessment outcome.

Once the suitability assessment is complete, the EU Team will then advise the duty holder in writing that WorkSafe is ready to consider an application.

For any contravention where two or more of the measures are deemed applicable, WorkSafe will also advise the duty holder in writing that it is unlikely a proposed enforceable undertaking will be accepted. This correspondence will include the relevant measures.

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

Advising a duty holder that WorkSafe is ready to consider an application is not a commitment on the part of WorkSafe to enter in to an undertaking.

### 3.4 STEP 4: Submitting an application

Any duty holder submitting an enforceable undertaking application must do so in writing using WorkSafe's enforceable undertaking template.<sup>8</sup>

Receipt of an application is not a commitment on the part of WorkSafe to enter into an undertaking.

Applications must include commitments that would promote the objectives or purposes of health and safety legislation for the benefit<sup>9</sup> of one or more of the following:

- the workers and/or work and/or workplace
- the wider industry or sector
- the community.

Promoting the objectives or purposes of health and safety legislation means the commitments should 'raise the bar' or promote progressively higher standards of work health and safety in the given industry or sector.

The proposal must:

- 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 in their sector/industry about the proposed measures and what feedback was received.
- Include appropriate amends for any victim (monetary or otherwise)
- Indicate whether the duty holder has had contact with the victim about the proposed amends and measures and what feedback was received.
- Acknowledge the underlying conduct or failures that have given rise to the contravention.
- One of WorkSafe's strategic priorities is to target risk. Therefore WorkSafe:
- Will align its enforceable undertaking decisions with any stated aim or strategy in a given sector or industry.
- Expects duty-holders from its focus-area sectors<sup>10</sup> to do more in their application to promote the objectives or purposes of health and safety legislation.

<sup>8</sup> WorkSafe's enforceable undertaking template can be found on the WorkSafe [website](#)

<sup>9</sup> Examples of benefits can be found in the [Enforceable undertakings practice guide](#)

<sup>10</sup> Refer to the definitions section.

Section 123(3) of HSWA provides that the giving of the enforceable undertaking does not constitute an admission of guilt in relation to the contravention. However, a proposal must acknowledge the underlying conduct or failures that have given rise to the contravention and accept responsibility for these. WorkSafe expects this to include details of the relevant steps/measures that the duty holder should have taken.

Irrespective of having received an application, any legal proceedings WorkSafe has initiated for the contravention will continue until the outcome of the application is finalised.

### 3.5 STEP 5: Considering the application

When assessing an application, WorkSafe will consider whether the proposed enforceable undertaking constitutes a proportionate enforcement outcome, taking into account the following factors:<sup>11</sup>

- The nature of the proposals in the application and the benefits that would be realised to the health and safety system from them.
- The nature of the duty holder's contravention and how serious it was.
- Information received from any interested party in relation to the contravention.
- Mitigation and remedial action already taken, or planned, by the duty holder regarding both the contravention and any person affected by it (including victims).
- The duty holder's past performance and history of compliance with health and safety legislation.
- Any likely outcome if the matter were dealt with by legal proceedings.
- How the proposal promotes WorkSafe's objectives and supports its strategic priorities.
- Any other matter which WorkSafe thinks relevant.

WorkSafe will contact victim(s) to either confirm any information they have provided to WorkSafe, or if they have not provided any information, to seek their views on the proposal. Views of victim(s) are important and will be actively considered as part of our decision making process.

Voluntary action taken by the duty holder following the contravention beyond what is required to meet their existing obligations under Health and Safety legislation can be included in the application.

WorkSafe will not accept a proposed enforceable undertaking where it:

- Contains a denial of responsibility for the contravention.
- Does not contain a statement acknowledging that harm was caused or risked by the contravention.
- Contains any clauses that may lead to possible non-compliance with the enforceable undertaking.
- Omits to include, or down-plays, 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.

<sup>11</sup> Examples of each of these factors can be found in the [Enforceable undertakings practice guide](#)

Applications will be considered by the WorkSafe Enforceable Undertaking Review Panel (the EU Panel).<sup>12</sup> The EU Panel will have a representative from each of the following functions within WorkSafe: Operations,<sup>13</sup> Regulatory Effectiveness and Legal Groups, and External Strategy and Engagement.

The Chief Operating Officer, the General Manager, Regulatory Effectiveness and Legal Groups, and the General Manager, External Strategy and Engagement will jointly nominate one individual from each group to comprise the EU Panel.

Panel membership is not fixed. Membership can change over time at the General Manager's discretion.

The Panel cannot include the enforceable undertakings Decision Maker,<sup>14</sup> or any person who has been involved with investigating, or providing advice on, the contravention.

WorkSafe must be satisfied that Panel members do not have any reasonably foreseeable<sup>15</sup> conflict of interest with a given enforceable undertaking application.

It may be that conflicts of interest are inevitable in some contexts and where that is the case, WorkSafe needs to be satisfied that the Panel member can appropriately manage the conflict.

The EU Panel is not a decision making body. It provides advice to the Decision Maker on whether or not the proposal should be accepted.

The EU Panel will review a proposal and determine whether:

- the EU Team will refer it back to the duty holder with feedback and a request they re-submit
- recommend to the Decision Maker that it is accepted, or
- recommend to the Decision Maker that it is declined.

It is not mandatory for the EU Panel to refer an application back to the duty holder with feedback and a request that they re-submit. If they choose to do so, it does not form a commitment on the part of WorkSafe to enter in to an undertaking.

To support their discussions, the EU Panel can request information from subject matter experts on specific issues or questions relating to their areas of knowledge and expertise. Subject matter experts include (but are not limited to):

- WorkSafe's legal services
- the lead investigation Inspector and/or their Manager or Chief Inspector, and
- WorkSafe Technical Specialists.

There will be a written account of any advice provided by a subject matter expert. This will be the responsibility of the EU Team.

The Head of Specialist Interventions is the enforceable undertakings Decision Maker. After receiving the EU Panel's recommendation the Decision Maker will make a decision to either accept or decline a proposal.

As part of this, the Decision Maker will consider if, because of the nature of the proposed undertaking, it's no longer in the public interest to continue with the prosecution.

The Decision Maker can:

- seek legal advice from WorkSafe's Chief Legal Advisor, and/or
- at their discretion, nominate that a decision on a given proposal is made by the Senior Leadership Team, or a sub-set of that team.

<sup>12</sup> Refer to the definitions section.

<sup>13</sup> 'Operations' refers to WorkSafe's High Hazards and Energy Safety and Operations and Specialist Interventions functions.

<sup>14</sup> Refer to the definitions section.

<sup>15</sup> A conflict of interest is 'reasonably foreseeable' if it could be ordinarily, properly or fairly capable of foresight.

WorkSafe's Chief Executive may, at their discretion, nominate that a decision is made by the Senior Leadership Team, or a sub-set of that team.

If the decision is to accept the enforceable undertaking, WorkSafe will:

- take all reasonable steps to discontinue any prosecution that has been taken in relation to the contravention as soon as practicable
- advise the duty holder of the decision and reasons for the decision
- work with the duty holder to develop and agree a communication protocol about the enforceable undertaking<sup>16</sup>
- notify victim(s) of the decision and reasons for the decision, and
- publish the accepted enforceable undertaking in full, including the reasons for the decision.

WorkSafe will consider the need for a joint public statement on a case-by-case basis after an enforceable undertaking is accepted. WorkSafe expects the duty holder to agree to a statement should we consider one necessary.

If the decision is to decline the proposal the Decision Maker will, in writing:

- advise the duty holder of the decision, and reasons for it, and
- provide the duty holder with an opportunity to make a submission addressing the reasons for the decision.

The Decision Maker will review the submission and decide whether or not to confirm the decision to decline. If decision-making has been deferred, this process will be undertaken by the Senior Leadership Team or a sub-set of that team.

If the decision is still to decline the enforceable undertaking, WorkSafe will:

- continue with any legal proceedings that have been taken in relation to the contravention
- advise the duty holder of the decision and reasons for the decision, and
- notify victim(s) of the decision and reasons for the decision.

### 3.6 STEP 6: Monitoring the enforceable undertaking

Each enforceable undertaking will be monitored against key milestones throughout its life. This will allow WorkSafe to assess whether or not it is being complied with<sup>17</sup> and whether the benefits expected from the enforceable undertaking have been realised.

WorkSafe will determine how an enforceable undertaking will be monitored and will be responsible for monitoring it once it is accepted. This will include at least one site inspection to check compliance with the terms of the agreement, and will include discussion with health and safety representatives.

A monitoring schedule will be developed and included as part of WorkSafe's acceptance of a proposed enforceable undertaking. The schedule will specify the key milestones of the enforceable undertaking and how these will be monitored by WorkSafe. This may include (but is not limited to):

- scheduled site visits, and
- the duty holder providing:
  - acceptable evidence of a key milestone being met
  - interim progress reports, and
  - a final compliance report.

<sup>16</sup> The communication protocol will include agreement about how the enforceable undertaking will be described publicly and how both parties will represent each other's roles and views on the matter.

<sup>17</sup> Refer to 'What happens when an enforceable undertaking is not complied with?' in this policy.



A timeframe for completion will also be set by the EU Team. Timeframes will be based on the details provided by the duty holder in the enforceable undertaking application and will be confirmed in the monitoring schedule.

It is the duty holder's responsibility to satisfy WorkSafe that they are fulfilling the terms of the enforceable undertaking and to provide reports on time as detailed in the schedule.

WorkSafe will use the monitoring schedule and its own inspections and oversight to ensure an enforceable undertaking is meeting its targets and objectives.

### **3.7 STEP 7: Completing the enforceable undertaking**

Once the enforceable undertaking is completed, the duty holder must submit a final compliance report.

WorkSafe will confirm, to its satisfaction, whether or not the enforceable undertaking has been met. This could involve a number of activities, including (but not limited to):

- reviewing the final report and considering it against the monitoring schedule
- contacting victim(s) and other interested parties as detailed in the undertaking, and
- WorkSafe inspections.

If WorkSafe deems the undertaking to be met, it will:

- confirm in writing to the duty holder that the enforceable undertaking is complete and that it will be discharged
- notify the victim(s) of the completion of the enforceable undertaking, and
- update the register.

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# 4.0

## Non-completion, variations and withdrawals

### **IN THIS SECTION:**

- 4.1 What happens if an enforceable undertaking is not complied with?
- 4.2 What are WorkSafe's processes for variations and withdrawals of an accepted enforceable undertaking?

## 4.1 What happens if an enforceable undertaking is not complied with?

Failing to comply with an enforceable undertaking is an offence under [section 126](#) of HSWA.

If WorkSafe believes a duty holder has not complied with any aspect of an enforceable undertaking, it may investigate and pursue enforcement action in relation to it.<sup>18</sup>

Where an enforceable undertaking is not complied with, any payments made pursuant to the enforceable undertaking will not be refunded.

If an enforceable undertaking is contravened WorkSafe may also bring proceedings for the contravention of the safety legislation the enforceable undertaking relates to.

## 4.2 What are WorkSafe's processes for variations and withdrawals of an accepted enforceable undertaking?

[Section 128](#) of HSWA provides that a duty holder who has an enforceable undertaking may at any time, with the written agreement of WorkSafe, withdraw the undertaking or vary the agreement.

### Withdrawal of the enforceable undertaking

Requests for withdrawal of an enforceable undertaking must be made in writing to the EU Team.

If WorkSafe consents to a withdrawal, the duty holder will no longer be bound by the terms of the enforceable undertaking. Withdrawal will only be considered in exceptional circumstances.

WorkSafe will seek the views of the victim(s) for any request to withdraw an application. Views of victim(s) are important and will be actively considered as part of our decision making process.

If WorkSafe has consented to a withdrawal, it may take legal action in relation to the original offence or alleged offence that the enforceable undertaking relates to.

If WorkSafe consents to the withdrawal it will:

- advise the duty holder in writing of the decision and reasons for the decision
- notify victim(s) of the decision and reasons for the decision, and
- publish the decision to withdraw an enforceable undertaking.

If WorkSafe declines the withdrawal request, it will:

- advise the duty holder in writing of the decision and reasons for the decision, and
- continue to monitor delivery of the enforceable undertaking as per the monitoring schedule.

If a request to withdraw an undertaking is declined, the duty holder will be required to continue delivering the enforceable undertaking as originally accepted by WorkSafe. If the duty holder does not continue to comply with the enforceable undertaking, WorkSafe may pursue enforcement action.

### Variation of the enforceable undertaking

Requests for variation of an enforceable undertaking must be made in writing to the EU Team.

WorkSafe will seek the views of the victim(s) for any request to vary an application. Views of victim(s) are important and will be actively considered as part of our decision making process.

<sup>18</sup> If the terms of an enforceable undertaking have been breached, the Court has a number of options available to it. These are detailed in [Section 127](#) of HSWA.

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 is later found to be impractical or can be achieved through other means.

Section 128 of HSWA states that an enforceable undertaking cannot be varied to provide for a different contravention.

If WorkSafe agrees to vary an enforceable undertaking, it will:

- advise the duty holder in writing of the decision and reasons for the decision
- review the monitoring schedule and update as required to reflect the variation
- notify victim(s) of the decision and reasons for the decision, and
- publish the decision to vary the enforceable undertaking.

If WorkSafe declines the request to vary an enforceable undertaking, it will:

- advise the duty holder in writing of the decision and reasons for the decision
- continue to monitor delivery of the enforceable undertaking as per the monitoring schedule.

If a request to vary an undertaking is declined, the duty holder will be required to continue delivering the enforceable undertaking as originally accepted by WorkSafe.

**What costs will be recovered by WorkSafe in an enforceable undertaking?**

WorkSafe is currently reviewing its fee charging policy, and we will not be charging fees while this process is ongoing.

WorkSafe can recover costs in the event of a prosecution. These costs are outlined in section 152 of HSWA.

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# Appendices

## IN THIS SECTION:

Appendix 1: Glossary

## Appendix 1: Glossary

The following terms are used in reference to enforceable undertakings:

TERM	DEFINITION
<b>Contravention</b>	An action which offends against the Health and Safety at Work Act 2015 and/or any Regulations made under it. It includes both health and safety contraventions.  For the purposes of this policy, a contravention also includes an alleged contravention.
<b>Decision Maker</b>	The person who receives advice from the WorkSafe Enforceable Undertaking Review Panel and makes the interim and final decision about whether or not to accept a proposed enforceable undertaking. This is the Head of Specialist Interventions.  The Decision Maker can, at their discretion, defer decision-making on any given enforceable undertaking to the WorkSafe Senior Leadership Team or a sub-group of that Team.
<b>Enforceable Undertaking</b>	An enforcement pathway that allows a duty holder to voluntarily enter into a binding agreement with WorkSafe. It generally used as an alternative to prosecution.  The agreement outlines actions the duty holder will undertake to address the contravention. It is expected to deliver activities which benefit workers, the wider industry or sector and/or the community as well as acceptable amends to any victim(s).
<b>Fatal Illness</b>	One that causes, or will cause, the death of an individual.
<b>Fatal Injury</b>	One that causes the death of an individual.
<b>Focus Area Sectors</b>	Sectors as identified in the Harm Reduction Plan 2016-2019, namely: Agriculture, Construction, Forestry, Manufacturing and Health Care and Social Assistance.
<b>HSWA</b>	Health and Safety at Work Act 2015.
<b>Operations</b>	Two teams within WorkSafe: High Hazards and Energy Safety and Operations and Specialist Interventions.
<b>Duty Holder</b>	The duty holder who proposes an enforceable undertaking and against whom the proposed enforceable undertaking becomes an accepted enforceable undertaking (if accepted). The term includes a reference to bodies corporate, the crown and a public authority.
<b>Suitability Assessment</b>	An assessment to determine whether an enforceable undertaking is a suitable enforcement outcome given the specific circumstances of a contravention.
<b>Vulnerable Victim</b>	Someone who has little control over their situation and may be more easily harmed, affected or hurt.  Examples of vulnerable people include, children; members of the public; young or elderly workers; pregnant or breastfeeding mothers or migrant workers.
<b>WorkSafe Enforceable Undertaking Team (EU Team)</b>	A team within WorkSafe whose function is to: <ul style="list-style-type: none"> <li>- administer the enforceable undertaking process</li> <li>- provide an advisory function to the sector and within WorkSafe, and</li> <li>- monitor all accepted enforceable undertakings.</li> </ul> The team is also responsible for applying the suitability assessment.
<b>WorkSafe Enforceable Undertaking Review Panel (EU Panel)</b>	A group that considers enforceable undertaking applications and makes recommendations to the Decision Maker about whether the proposal should be accepted or not.  It is made up of three representatives, one each from Regulatory Effectiveness and Legal Groups, Operations, and External Strategy and Engagement.

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