

Enforceable undertakings

PRACTICE GUIDE

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Te Kāwanatanga o Aotearoa
New Zealand Government

WORKSAFE
Mahi Haumarū Aotearoa

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Purpose

This guidance explains how WorkSafe New Zealand considers, decides on, and monitors enforceable undertakings (EUs) under the Health and Safety at Work Act 2015 (HSWA).

This guidance:

- explains what an EU is and its purpose
- outlines the EU application process and key decision points
- differentiates between pre-charge and post-charge EUs
- sets out expectations for EU content and assessment
- describes monitoring, cost recovery, variations, and withdrawals.

Who this is for

This guidance is for:

- duty holders considering applying for an EU
- people supporting or advising duty holders
- WorkSafe kaimahi involved in considering, deciding on, or monitoring EUs.

Relevant legislation

This document supports business processes arising from HSWA, specifically:

- Section 123: Regulator may accept enforceable undertakings
- Section 124: Notice of decision and reasons for decision
- Section 125: When enforceable undertaking is enforceable
- Section 126: Compliance with enforceable undertaking
- Section 127: Contravention of enforceable undertaking
- Section 128: Withdrawal or variation of enforceable undertaking
- Section 129: Proceedings for alleged contravention.

Considerations for this process

When using this guidance, consider WorkSafe's:

- *Enforceable undertakings policy*
- *Our regulatory approach*
- *Prosecution policy*
- information for victims and whānau about enforceable undertakings.

General information

An EU is a formal written agreement between WorkSafe and a duty holder that's entered into voluntarily after a breach, or alleged breach, of HSWA or the regulations. It sets out a series of actions that the duty holder will take to:

- address any systemic health and safety issues, and
- make improvements in response to the breach.

While entering into an EU is voluntary, once WorkSafe has accepted it, it becomes legally binding.

The aim of an EU is to improve health and safety practices and prevent future harm. They're only used when it's considered to be a fair and proportionate response based on the circumstances.

An EU:

- sets conditions for a duty holder to make positive changes that will continuously improve work health and safety performance and standards
- is monitored for compliance to ensure that the duty holder meets agreed-upon deliverables and outcomes
- focuses on the purpose of HSWA.

Types of EU

There are two types of EUs – pre-charge and post-charge. Both are voluntary, and any application must meet the principles set out in the *Enforceable undertakings* policy.

PRE-CHARGE EUs

A pre-charge EU application is considered and either accepted or declined before any charges have been filed.

We may continue an investigation while an EU is being considered pre-charge; however, the Inspectorate will not have direct contact with the duty holder about the investigation during this period unless necessary.

Pre-charge EU applications are received, considered, and decided upon within a timeframe based on what stage the investigation is at. If a pre-charge EU application is not accepted within the stated timeframe, the matter is referred back to the Inspectorate to consider next steps.

POST-CHARGE EUs

A post-charge EU application is considered and either accepted or declined after charges have been filed.

What prompts a pre-charge EU?

The Inspectorate will gather evidence as part of an investigation, which is then provided to WorkSafe's Legal team for review. The Legal team considers whether there is a *prima facie* case that a breach of HSWA has occurred.

The legal review will include an opinion of whether the alleged breach amounts to an offence under section 47 of HSWA.

If the Legal team is satisfied a *prima facie* case exists and the breach does not amount to an offence under section 47 of HSWA, the Inspectorate:

- provides the duty holder with a written outline of the alleged breach and the evidence WorkSafe has gathered to support it. The letter encourages the duty holder to seek independent legal advice.
- the letter also includes an offer from the EU team to meet with the duty holder to discuss a potential EU application. A duty holder may also register their interest in an EU at any time during an investigation.

What happens with investigations/prosecutions?

Where a duty holder has expressed an interest in, or applied for, an EU, we may continue our investigation, enforcement processes, or any legal proceedings as independent but parallel processes. For pre-charge EUs, we aim to make a decision on the duty holder's application within the 12-month timeframe for filing charges. If this is not possible, we may still file charges.

WorkSafe will take all reasonable steps to adjourn any court proceedings until a decision on an EU application has been made, but only where the duty holder is genuinely committed to entering into an EU. Adjournments will not be agreed to where adjournments are perceived as being used as delay tactics.

Registration of interest

Any duty holder considering an EU must formally register their interest with WorkSafe. WorkSafe may also identify potential breaches and invite a duty holder to consider an EU.

In both cases, a registration of interest must be submitted in writing to the EU team at EnforceableUndertakings@worksafe.govt.nz

The registration of interest should clearly state:

- that an EU is being sought
- who is seeking the undertaking
- the breach or event that the undertaking would seek to address.

Registration of interest is voluntary and non-binding on either party.

A duty holder can register interest at any time following an alleged breach. However, we will not progress an EU application until a legal review has been completed. A duty holder may also withdraw their registration of interest at any time.

Legal review

Before we can consider any EU application, we must be satisfied that the alleged breach would not amount to an offence under section 47 of HSWA. This is a required step and is addressed as part of the legal review of the evidence gathered during an investigation.

For pre-charge EUs, WorkSafe's Legal team reviews the file to confirm that a *prima facie* case exists. This ensures there is credible evidence of a breach of HSWA or the regulations.

Where WorkSafe has identified an alleged breach, a legal review may occur before a duty holder registers interest. Conversely, a registration of interest does not automatically trigger a legal review; this can only take place once the investigation has progressed to a stage where the file is ready for consideration of a *prima facie* case.

Meeting with the duty holder

The EU team will offer to meet with a duty holder, either after they register interest or when WorkSafe has identified a breach. These meetings are used to outline the EU process, share examples of previous undertakings, and discuss a proposed timeline, and are offered for both pre-charge and post-charge EUs.

For pre-charge EUs, a legal review must be completed before an application can be progressed, to ensure WorkSafe is satisfied that a *prima facie* case exists. While this review is required before progressing the application, it does not prevent WorkSafe from offering or holding meetings with the duty holder at any stage.

Application

Submitting an application for an EU does not create any commitment on the part of WorkSafe to accept or enter into an agreement.

Duty holders must submit their application on the *Enforceable undertakings application form* and email it to the EU team at EnforceableUndertakings@worksafe.govt.nz

There is no application fee.

The EU team will acknowledge receipt of the application in writing.

Applications must clearly set out:

- the actions the duty holder proposes to take to address the breach, improve health and safety systems, and prevent future harm
- the duty holder's acknowledgement of the conduct or failures that led to the breach
- any appropriate amends for victims (monetary or otherwise)
- whether the duty holder has had contact with the victim about the proposed amends and measures and what feedback was received
- consultation with interested parties, such as victims, unions, or industry bodies, regarding the proposed actions
- how the proposed actions support the purpose of HSWA, including improving work health and safety for workers, workplaces, the wider industry, and the community
- the rationales for the proposed activities, the intended benefits, and the outcomes expected
- lessons learned and a commitment to share these with recognised industry partners or bodies, including what changes were implemented after the breach.

Making a decision about an EU

Reviewing the application

Applications for an EU are reviewed by an EU panel; a group of selected WorkSafe kaimahi convened to provide advice on the application. The EU panel provides advice to a decision-maker on whether the application should be accepted but does not make the final decision.

For pre-charge matters, the decision-maker may choose to consider the application directly, without convening a panel. In all cases, the EU team prepares a review of the application against the EU 'should/must not' criteria outlined in the *Enforceable undertakings* policy to support the decision-maker's consideration.

To support their recommendation, the EU panel may request information from subject matter experts on specific issues or questions relating to their areas of knowledge and expertise.

The EU panel will review an application and determine whether to:

- refer it back to the duty holder with feedback and a recommendation they resubmit
- recommend to the decision-maker that the application is accepted
- recommend to the decision-maker that the application is declined.

Proportionate enforcement outcome

As part of their consideration, the EU panel and the decisionmaker will take into account whether the proposed EU constitutes a proportionate enforcement outcome. This includes considering:

- the nature of the activities proposed and the benefits they would deliver to workers, workplaces, and the wider sector
- the nature of the duty holder's alleged breach and how serious it was
- information received from any interested party the duty holder has consulted with in relation to the alleged breach
- mitigation and remedial action already taken or planned by the duty holder regarding the alleged breach and any persons affected by it (including victims)
- the duty holder's past performance and history of compliance with health and safety legislation
- how the undertaking supports WorkSafe's objectives and strategic priorities
- the views of any victims on the proposed EU activities, and on the potential for an EU as an outcome
- any other matters which WorkSafe considers relevant.

Victim consultation

WorkSafe consults victims for both pre-charge and post-charge EUs. Victims are informed of the implications of the EU process, including the effect on prosecution options.

We contact victim(s) to either confirm any information they have provided to us or the applicant of the EU, or if they have not provided any information, to seek their views on the proposed activities and on the potential of an EU as an outcome. While they are not determinative the views of victim(s) are important and are actively considered as part of our decision-making process.

Accepting an EU

If the decision is to accept an EU application, we will:

- take all reasonable steps to discontinue any prosecution related to the alleged breach (post-charge) or conclude the investigation (pre-charge), as soon as practicable
- advise the duty holder of the decision and reasons for it
- notify victim(s) of the decision and reasons for it
- publish the accepted EU in full, including reasons for acceptance, on our website
- consider whether a joint public statement is necessary.

Declining an EU

If the decision is to decline an EU application, we will:

- advise the duty holder of the decision and reasons for it
- provide the duty holder with an opportunity to make a submission addressing the reasons for the decision. This submission:
 - must be made in writing to the Enforceable Undertakings team at EnforceableUndertakings@worksafe.govt.nz
 - 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.

If the duty holder makes a submission, the decision-maker will confirm whether to maintain the decision to decline. If the decision remains WorkSafe will:

- continue with any legal proceedings or investigations related to the alleged breach
- advise the duty holder of the decision and reasons for it
- notify victim(s) of the decision and reasons.

Monitoring an EU

Each EU is monitored throughout its lifecycle. This allows us to assess compliance with the EU and progress toward its stated targets and objectives.

Monitoring may include:

- compliance documents developed by the EU team outlining the enforceable terms contained within the agreement and the evidence required to support their completion
- an agreed timeframe for completion of the enforceable undertaking
- scheduled site visits
- discussions with workers
- the duty holder providing:
 - acceptable evidence to support the completion of the enforceable terms
 - bi-annual progress reports that provide the EU team with an outline of how the EU is progressing, any challenges the duty holder has encountered, and positive outcomes observed
 - a final compliance report that summarises the activities delivered, the outcomes, learnings, and a reflection on the EU journey.

Completing an EU

Once the EU has been completed, the duty holder must submit a final compliance report.

The EU team confirms whether the terms of the EU have been met to WorkSafe's satisfaction. This may involve:

- reviewing the final report and all evidence submitted to demonstrate compliance with the enforceable terms
- considering the evidence against the compliance documents detailing the terms of the agreement
- holding a final compliance meeting.

If the EU team deems the terms of the EU have been met, it:

- confirms in writing to the duty holder that the EU is complete and will be discharged
- notifies the victim(s) of the completion of the EU, where appropriate
- updates the WorkSafe EU register to show the EU has been discharged.

Non-compliance

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

If the EU team believes the duty holder has not complied with terms of the EU, we may investigate further. This may result in enforcement action.

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

Variation and amendments

The duty holder can apply to vary the terms of an EU. The application must be made in writing to EnforceableUndertakings@worksafe.govt.nz

We will only consider variations where:

- there is a clear reason for why the EU needs to be varied
- compliance with the enforceable terms can be achieved through a different means that does not alter the spirit or intent of the original enforceable terms, and
- the varied agreement results in equal or better outcomes.

If we receive a request to vary an EU, we may contact the victim(s) and consider their views.

Withdrawing an EU

The duty holder can apply to withdraw from an EU. The application must be made in writing to EnforceableUndertakings@worksafe.govt.nz

We are under no obligation to accept withdrawal requests and consider each on its merits. We only consider withdrawing an EU in exceptional circumstances.

Where a withdrawal is agreed to, the duty holder will no longer be bound by the terms of the EU, and we may decide to take enforcement action in relation to the original breach.

If we receive a request to withdraw an EU, we may contact the victim(s) and consider their views.

Cost recovery

Under HSWA, we may refuse to accept an EU if it does not provide for reimbursement of any reasonable costs and expenses (costs) incurred by WorkSafe in relation to the:

- EU itself
- breach or alleged breach.

We consider costs on a case-by-case basis. These may include any incurred costs in relation to WorkSafe employees, agents, or contractors.

We provide an estimate of reasonable costs once an application has been received, and the EU team has considered the compliance monitoring aspects of the agreement.

Duty holders should indicate whether they will meet these costs as part of the application process.

The agreed costs will be stated in the EU agreement.

Payment arrangements, including timing and invoicing, will be agreed with the duty holder before the EU is finalised.

Appendix

IN THIS SECTION:

Appendix 1: Glossary

TERM	DEFINITION
Breach	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 breaches. For the purposes of this guidance, a breach also includes an alleged breach.
Decision-maker	The person who receives advice from the WorkSafe Enforceable Undertaking panel and makes the interim and final decision about whether or not to accept a proposed enforceable undertaking. This can be one of, the Head of Inspectorate, Head of Regulatory Services and General Counsel, Deputy Chief Executive – Operations or Chief Executive.
Enforceable undertaking	An enforcement pathway that allows a duty holder to voluntarily enter into a binding agreement with WorkSafe. It is generally used as an alternative to prosecution. The agreement outlines actions the duty holder will undertake to address the breach. 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).
HSWA	Health and Safety at Work Act 2015.
Duty holder	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.
WorkSafe Enforceable Undertaking team (EU team)	A team within WorkSafe whose function is to: <ul style="list-style-type: none"> – oversee and administer the enforceable undertaking process – provide an advisory function to stakeholders – monitor all accepted enforceable undertakings, and – determine if accepted undertakings have been complied with and if so, discharge accordingly
WorkSafe Enforceable Undertaking panel (EU panel)	A group of WorkSafe kaimahi that considers enforceable undertaking applications and makes recommendations to the decision-maker about whether the proposal should be accepted or not.
<i>Prima facie</i> case	The point at which WorkSafe is satisfied that there is some evidence (not inherently incredible), that if accepted, would establish each essential element of the relevant alleged breach.
Victim	As defined in the Victim's Rights Act 2002.

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worksafe.govt.nz



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