



Government
of South Australia

SafeWork SA

Enforceable Undertaking Application Guidelines

Table of contents

Introduction	3
Purpose	3
What is an EU?	3
When can an EU be proposed?	3
Applying for an EU	4
Content of an application	4
Possible Activities	6
Evaluation of the EU application by the Regulator	7
Stakeholder Consultation	8
Crown Solicitor's Office (CSO) Engagement	9
The Regulator's decision	9
Timeframes	10
EU Publication	11
Failure to comply	11
Penalties	11
Varying or withdrawing an EU	11
Further information	12

Introduction

The Executive Director (the Regulator), SafeWork SA is responsible for a range of functions contained in the *Work Health and Safety Act 2012* (SA) (the Act), including monitoring and enforcing compliance with the Act.

The Act provides the Regulator with a range of enforcement options when non-compliance is identified, including prosecution. An alternative enforcement option to prosecution provided by the Act is a work health and safety undertaking, commonly referred to as an Enforceable Undertaking (EU).

Purpose

This guideline documents the process for EU application, the factors that will be considered by the Regulator in deciding whether to accept an EU application and some general guidance of activities that may be included in an EU.

What is an EU?

An EU is a written and legally binding agreement proposed by a person or entity (now referred to as the 'applicant') following a contravention or alleged contravention of the Act. Non-compliance with agreed enforceable activities may lead to prosecution.

Initiatives that are contained in an EU should seek to resolve the conduct of concern that has led to a characterisation of a contravention or an alleged contravention, seek to rectify the consequences of the conduct and provide an EU commitment that is above and beyond what might occur if a prosecution were to take place.

Activities associated with an EU should be substantial and aimed at delivering benefits to the workplace, industry and the community. The EU application should seek to convince the Regulator, or their delegate, that the EU is an effective regulatory outcome compared with other available enforcement measures such as prosecution and that the EU commitment outweighs the applicant's (characterised or alleged) culpability.

When can an EU be proposed?

An undertaking can be proposed by a company or an individual:

- Where a characterisation of a contravention or an alleged contravention has been identified by the Regulator during compliance activities or an Investigation into an incident; or
- When proceedings for an offence against the Act have been brought against the company or individual.

The applicant must contact the SafeWork SA Regulatory Assurance Team prior to applying for an EU. The team will provide advice regarding the application process and the factors that are considered when the application is being evaluated by the Regulator. The service is aimed at offering sufficient information to allow an applicant to determine if an EU is appropriate for them. All communication with Regulatory Assurance regarding the development of an EU is on a without prejudice basis and will be conducted directly with the applicant and / or their legal representative.

The Regulatory Assurance Team can be contacted by email agdswsaolst@sa.gov.au.

An EU cannot be accepted for a characterisation of a contravention or alleged contravention of both Industrial Manslaughter and / or a category one offence in accordance with the Act.

Applying for an EU

All persons are obliged to comply with their duties under the Act. Therefore, any term of an undertaking that represents minimum legislative compliance (also known as 'Rectifications') cannot be considered for the purpose of an undertaking.

The application must be submitted on the **Enforceable Undertaking Application** template and the **Annexure A** template which are both available on the SafeWork SA website.

Content of an application

An application for an undertaking must include the following information:

- details of the applicant.
- details of the characterisation of a contravention or the alleged contravention.
- details of the events surrounding the characterisation of a contravention or alleged contravention.
- details of any enforcement notices issued that relate to the characterisation of a contravention or alleged contravention.
- details of any injury sustained, or illness suffered from the characterised / alleged contravention.
- when a characterised / alleged contravention is associated with injury/illness:
 - details of the type of workers compensation provided (if the injured person is a worker)
 - details of the support provided to the injured person to overcome the injury / illness;

- details of any existing work health and safety systems at the workplace including the level of auditing currently undertaken.
- Details of any consultation undertaken with respect to this application – this may include consultation with injured person(s), workers, industry members or with the community.
- any rectifications made because of the characterised / alleged contravention.
- an acknowledgement that a characterised / alleged contravention has occurred.
- a statement of regret.
- acknowledgment that the undertaking will be published.
- acknowledgment of ability to comply with the terms of the undertaking.
- where a term involves a donation, sponsorship or scholarship, details of relationships held with the beneficiaries will be communicated.
- statement granting the regulator a permanent, non-exclusive license to use any materials developed because of the undertakings.
- Annexure A must also be completed and submitted along with the EU application to SafeWork SA. This form consists of questions relating to national WHS compliance history and an opportunity to provide the Regulator with voluntary confidential information that the applicant believes is relevant to the EU application. Disclosures related to national WHS compliance history are subject to any legal constraints such as spent conviction legislation or by another relevant Act.

The EU must also set out the terms that the applicant will be accountable for completing; this means that all EU activities must contain a description of what will be supplied as evidence of compliance with that activity.

All terms are to have a nominated cost and a nominated period by which the term will be met. If the applicant is claiming internal wage costs for implementing an EU term, they must be included in the minimum cost of the term, with the amount attributed to internal wages clearly stated. On-costs may be included only when a new position is created. For all other activities using existing internal resources, costs must only be calculated using the applicable hourly rate.

All EU activities are to be completed by 18 months from the day of acceptance unless permission has been given by the Regulator to extend the duration to 24 months. These terms could include:

- a commitment to disseminate information about the undertaking to workers, and other relevant parties.

- a commitment to participate constructively in all compliance monitoring activities of the undertaking.
- activities that will deliver workplace benefits (tangible health and safety initiatives that will benefit workers);
- activities that will deliver industry benefits;
- activities that will deliver community benefits;
- an agreement to pay the Regulator's costs including:
 - investigation costs associated with the characterised / alleged contravention and proposed undertaking.
 - legal costs associated with the alleged contravention and proposed undertaking.
 - administrative costs associated with the alleged contravention and proposed undertaking.
 - compliance and monitoring costs.

An application may also include:

- a commitment to develop and implement safe systems of work (or maintain safe systems of work if already implemented) to ensure the applicant is compliant with the Act.
- a commitment to ensure that the safe systems of work are audited by a third-party auditor and the report provided to the Regulator.

Possible Activities

EUs allow for more flexible and broad outcomes than those available through prosecution. A range of activities can be considered and proposed to achieve those outcomes. The following are examples of suitable activities that might be included in an EU:

- conducting, facilitating or funding research into a safety issue relevant to the industry.
- implementation of specified projects, such as special training programs to address needs for workers, supervisors and management.
- promotion and education campaigns targeted to various sectors.
- targeted publicity regarding the characterised or alleged breach.
- funding WHS training to amplify expertise within the workplace or industry sector.

- industry commitments, such as implementation of an industry-wide awareness program or publication of material in relation to the incident / event and undertaking in relevant trade journals or newsletters.
- donation of funds to not-for-profit organisations with specific focus on work health and safety.
- assisting in or funding the development of relevant industry standards.
- funding tertiary scholarships for work health and safety students in consultation with relevant registered training organisations or universities.

For more information on suitable activities that may be included in an Enforceable Undertaking, refer to the SafeWork SA website:

<https://www.safework.sa.gov.au/enforcement/enforceable-undertakings>

Where a PCBU proposes a monetary payment to an injured worker or next of kin, this commitment must not be contingent on the Regulator's acceptance of the EU and must not be included in the EU application's enforceable terms.

Any monetary support provided or proposed for an injured worker or their next of kin should be documented in Section 1.7 of the EU application. This section requires applicants to outline the nature and details of any support provided or proposed for the injured person, their family, or other affected parties.

Evaluation of the EU application by the Regulator

When deciding whether to accept an EU, the Regulator will consider several factors, including:

- the seriousness of the characterised / alleged contravention.
- the injury/injuries that resulted as part of the characterised or alleged contravention.
- the compliance history of the applicant.
- the effectiveness of the enforceable undertaking as a regulatory outcome compared with prosecution.
- the significance of the commitment compared to the culpability of the company or individual.
- the financial ability of the applicant to meet the terms of the proposed undertaking.
- the conduct of the applicant in respect of mitigation and remedial action, regarding both the characterised / alleged contravention and any person affected by the characterised / alleged contravention.

- submissions received from any relevant party, including any injured worker/s or next of kin.
- the likely outcome should the matter be dealt with through legal proceedings.
- any other matters which the Regulator considers relevant.

All applications are considered on a case-by-case basis and a decision to accept or reject an EU in a particular set of circumstances will not be regarded as a binding precedent for future decisions.

Stakeholder Consultation

For EU's involving injury or death to a worker, the Regulator will seek the view of the worker or next of kin or guardian (as relevant) with respect to the EU. The consultation will primarily be conducted by a Contact Liaison Officer (CLO). The worker, next of kin or guardian will be invited to provide comment on matters such as:

- general views on safety measures at the workplace apart from safety issues relating to the incident.
- details of current employment status.
- status of recovery from injuries.
- details of the worker's likely future work capacity.
- details of actions the applicant has taken to assist in quality of life for the worker / next of kin since the incident.
- their views regarding an EU as an alternative to prosecution of the applicant.

It is important to note that submissions made by the worker or next of kin will be one of many factors that the Regulator will consider in determining whether to accept an EU.

The Regulatory Assurance Team will notify the Contact Liaison Service at the following time points:

- When an EU is being considered by a person or entity. This is defined as when Regulatory Assurance has been contacted by the applicant or their legal representation to advise of their intention to apply for an EU.
- When an applicant has submitted their EU application to the Regulator.
- When an EU application has been accepted or rejected by the Regulator.

Crown Solicitor's Office (CSO) Engagement

The CSO (or external counsel representing SWSA) will be notified by the Regulatory Assurance Team when:

- An applicant notifies the Regulatory Assurance Team that they intend to apply for an EU.
- When an applicant submits an EU application to be considered by the Regulator.
- When a decision by the Regulator is made.

The Regulator's decision

The Regulator is not compelled to accept an application for an EU.

Written notice of the decision to accept or reject the EU will be given to the applicant which will include reasons for the Regulator's decision. An EU will not take effect until it is signed by the applicant and the Regulator (or their delegate).

If the Regulator accepts the EU, the EU Coordinator will engage with the successful applicant to verify that the specific activities outlined in the EU have been completed by the prescribed timeframe.

This will also involve:

- regular dialogue between the EU Coordinator and the successful applicant with a focus on compliance with the accepted EU.
- the company or individual providing periodic updates on the status of the EU progress and evidence to support compliance.
- when required, the EU Coordinator attending the workplace to validate the evidence provided to confirm compliance,

An EU application may be withdrawn at any time before being accepted by the Regulator. After being accepted however, the undertaking may only be varied or withdrawn by the written agreement of the Regulator.

An EU will be concluded on written advice from the Regulator confirming that all requirements of the EU have been satisfactorily executed and the undertaking is considered concluded.

Timeframes

An application may be refused if the Regulator considers that there was an unreasonable delay in the application's submission. Investigation and legal proceedings will continue until an EU application is accepted.

The submission of the EU application will be within 90 days of receipt of the summons to allow expedited processing where legal proceedings have been initiated by the Regulator.

Applications submitted **less than 28 days prior** to the applicant's next court date will not be assured of the Regulator's decision by their next court date,

There must be appropriate time to both process the application and for the Regulator to consider the application.

Service Standards

The following service standards will apply to the management of an EU application.

- An initial meeting or phone call prior to the commencement of writing an EU application draft will occur at the initiation of the applicant or their legal representation with the relevant Regulatory Assurance Team member.
- A meeting will be offered between the applicant and / or company representative / legal representation and the relevant Regulatory Assurance Team to provide feedback once a draft has been submitted and reviewed. Feedback will be provided within 28 days of draft submission. Feedback will be available a total of twice per EU application and may be provided in person or electronically depending on the applicant's preference.
- Acknowledgement of the applicant's submission will occur via email within 14 days.
- One EU application submission to the Regulator (or delegate) per applicant is permissible per matter unless the Regulator (or delegate) invites the applicant to resubmit their EU application at their discretion.
- The EU application must be submitted in the name of a single defendant. Where there are multiple associated defendants, each must lodge a separate EU application.
- Communication of the Regulator's decision to the EU applicant will occur within 14 days from the date of decision.

EU Publication

The terms of an accepted EU are a matter of public record.

When an EU application is accepted, the EU agreement and the Regulator's reasons for decision will be published as per the Act Section 217(2) within 28 days of the date of the decision.

EUs will remain on SafeWork SA's public web site after an applicant has discharged all obligations of the undertaking and will only be removed at the discretion of the Regulator.

Failure to comply

Once accepted and signed by the applicant and the Regulator, an EU is a legally binding agreement, and non-compliance is subject to prosecution and significant penalties. Compliance with the terms of an EU will be strictly monitored by the Regulator.

The Regulator will take enforcement action for a breach of an EU and may ultimately seek to prosecute the original characterised or alleged contravention.

Penalties

The following penalties may be imposed by a Court for non-compliance with an EU.

- Monetary fines - The maximum penalty for contravening an undertaking for an individual is a fine of up to \$50,000. In the case of a body corporate the maximum penalty is a fine of up to \$250,000.
- A direction to the company or individual to comply with the undertaking.
- An order discharging the undertaking.
- Orders to pay legal costs related to pursuing the matter.
- Order to pay the costs associated with monitoring compliance of the EU in the future.
- Commencement of proceedings for the original characterised or alleged contravention subject to statute of limitations.

Varying or withdrawing an EU

A company or individual may apply to vary or withdraw an EU. Requests to vary an undertaking will only be considered if:

- it does not alter the intention of the original undertaking;

- compliance with the original undertaking is subsequently found to be impractical;
- there has been a material change in circumstances.

Variations or withdrawals of an undertaking will only take effect when authorised by the Regulator or their delegate.

Any proposed variations to a term must be submitted to the Regulator no later than 14 days prior to the term's agreed completion date.

Withdrawals of, and variations to, undertakings will be published on the SafeWork SA website.

Further information

For further information, please contact SafeWork SA Regulatory Assurance Team via email agdswoalst@sa.gov.au or visit the SafeWork SA website <http://www.safework.sa.gov.au>.