



Guidelines for the Acceptance of Enforceable Undertakings

July 2023, Version 1

Contents

Introduction	3
Purpose of these guidelines	3
What is an EU?	3
When can an EU be proposed?.....	3
Proposing an EU	4
Content of a proposal	4
Possible Strategies.....	5
Evaluation of the proposal by the Regulator	6
Stakeholder Consultation	6
The Regulator's decision	7
Timeframes	8
Service Standards	8
Publication of EUs	8
Failure to comply with an EU	8
Penalties	9
Varying or withdrawing an EU	9
Further information	9

Introduction

SafeWork SA is responsible for providing work health and safety, public safety and state-based industrial relations services across South Australia.

The Executive Director, SafeWork SA is the Regulator 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 of these guidelines

These guidelines document the processes for proposing an EU; the factors that will be taken into account by the Regulator in deciding whether to accept such a proposal and some general guidance of the types of terms and strategies that may be included in an EU.

What is an EU?

An EU is a written, legally binding agreement proposed by a company or individual following a contravention or alleged contravention of the Act.

Initiatives that are contained in an EU should seek to resolve both the behaviour of concern that has led to the contravention or alleged contravention, and also seek to rectify the consequences of the conduct. Activities associated with an undertaking should be substantial and aimed at delivering benefits to the workplace, as well as industry and the community.

When can an EU be proposed?

An undertaking can be proposed by a company or individual:

- where a contravention or an alleged contravention has been identified by the Regulator during the course of compliance activities or an investigation into an incident by SafeWork SA inspectors; or
- proceedings for an offence against the Act have been brought against the company or individual.

Before proposing an EU it is recommended that a company or individual contact SafeWork SA Regulatory Assurance. A member of the team will provide advice regarding the proposal submission process, the factors that are considered when evaluating the proposal and the negotiation and acceptance process that will be followed. This service is aimed at giving sufficient information to allow a person to determine if proposing an EU is the most appropriate path to take. The team member will also outline the scope of activities likely to be required within the proposed undertaking for it to be accepted.

All communication with Regulatory Assurance regarding the development of an EU is on a without prejudice basis and will be conducted directly with the person seeking to propose an EU, or their legal representative. A meeting with a member of

Regulatory Assurance can be arranged by calling 7085 1559 or email OLST.SWSA@sa.gov.au

An EU **cannot be accepted** for a contravention or alleged contravention of a category one offence. In accordance with section 31 of the Act a person commits a category one offence if:

- the person has a health and safety duty; and
- the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- the person was reckless as to the risk of death or serious injury or illness.

Proposing an EU

All persons are obliged to comply with their duties under the Act. Therefore, any term of an undertaking that merely represents ordinary expected compliance cannot be considered for the purpose of an undertaking.

All proposed undertakings need to be in writing and contain certain information, including some mandatory terms. The proposal should be submitted on the ***Application for Proposed Enforceable Undertaking*** form which is available on the SafeWork SA website.

Content of a proposal

A proposal for an undertaking must include the following information:

- details of the person proposing the undertaking;
- details of the alleged contravention;
- details of the events surrounding the alleged contravention;
- details of any enforcement notices issued that relate to the alleged contravention
- details of any injury sustained or illness suffered from the alleged contravention;
- when an 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 management systems at the workplace including the level of auditing currently undertaken;
- any rectifications made as a result of the contravention;
- an acknowledgement that an alleged contravention has occurred;
- a statement of regret;
- a statement of assurance about future work health and safety behaviour;
- acknowledgment that the undertaking will be published;
- acknowledgement of ability to comply with the terms of the undertaking;
- where a term involves a donation, details of any relationships held with the beneficiaries and details of how the reason for the donation will be communicated;
- statement granting the regulator a permanent, non-exclusive licence to use any materials developed as a result of the undertakings.

The undertaking must also set out the terms that the person will be accountable for completing. Where possible, all terms are to have a nominated cost and a nominated period by which the term will be met. These terms could include:

- a commitment that the behaviour that led to the alleged contravention has ceased and will not reoccur;
- a commitment to the ongoing effective management of WHS risks;
- 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;
- strategies or activities that will deliver workplace benefits (tangible health and safety initiatives that will benefit workers);¹
- strategies or activities that will deliver industry benefits;
- strategies or activities that will deliver community benefits;
- an agreement to pay the Regulator's costs including:
 - investigation costs associated with the 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; and
 - publication costs.

(Costs may be waived in certain circumstances such as on compassionate grounds, cost recovery would be disproportionate to the alleged contravention or it is not in the public interest.)

If the Regulator considers it appropriate in the circumstances, a proposal may also include:

- a commitment to establish and maintain a work health and safety management system ("WHSMS");
- a commitment to ensure that the WHSMS is audited by the third party auditors and the report provided to the Regulator; and
- a commitment to implement the recommendations from these audits.

Possible Strategies

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

- conducting, facilitating or funding research into a safety issue relevant to the industry;

¹ See under heading Possible Strategies

- implementation of specified projects, such as special training programs to address particular needs for workers, supervisor and management;
- promotion and education campaigns targeted to various sectors;
- targeted publicity regarding the alleged breach;
- employment and/or funding WHS expertise within the workplace or industry sector;
- community service commitment, such as implementation of an industry-wide awareness program or publication of material dealing with the undertaking in relevant trade journals or newspapers;
- donation of funds to a not-for-profit organisation with specific focus on work health and safety;
- assisting in or funding the development of industry standards relevant to the person's industry; and
- funding tertiary scholarships for work health and safety students in consultation with relevant universities.

Evaluation of the proposal by the Regulator

When deciding whether to accept an undertaking, the Regulator will consider a number of factors, including:

- the seriousness of the contravention and the nature of the alleged misconduct;
- the injury/injuries that resulted as part of the contravention;
- the compliance history of the company or individual;
- the effectiveness of the enforceable undertaking as a regulatory outcome compared with other available enforcement measures;
- the significance of the commitment compared to the culpability of the company or individual;
- the financial ability of the company or individual to meet the terms of the proposed undertaking;
- the conduct of the company or individual in respect of mitigation and remedial action, regarding both the contravention and any person affected by the 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; and
- any other matters which the Regulator considers relevant.

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

Stakeholder Consultation

For undertakings involving injury or death to a worker, the Regulator will seek the view of the worker, next of kin or guardian (as relevant) with respect to the undertaking as a response to the incident. The worker, next of kin or guardian will be invited to provide comment on matters such as:

- details of the incident;
- general views on safety measures at the workplace - apart from safety issues relating to the incident;
- details of current employment status;
- details of the worker's likely future work capacity;
- details of where the worker is in recovering from the injury;
- information regarding any actions that the organisation proposing the undertaking has made to assist in quality of life for the worker since the incident; or
- their views regarding an EU as an alternative to the matter being addressed through legal proceedings.

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

The Regulator's decision

The Regulator is not compelled to accept a proposal for an undertaking.

Written notice of the decision to accept or reject the EU will be given to the company or individual submitting the proposal. The written notice will include reasons for the Regulator's decision.

An EU will not take effect until it is accepted and signed by the Regulator (or their delegate) and the outcome of the decision is communicated to the company or individual who proposed the undertaking.

If the Regulator accepts the EU, a SafeWork SA inspector will be allocated to work with the company or individual to verify that the specific activities outlined in the undertaking have been completed.

This will involve:

- regular dialogue between the inspector and the company or individual who proposed the undertaking with a particular focus on clarifying and resolving the issues at the earliest opportunity;
- the company or individual providing periodic updates and evidence to the inspector outlining progress and demonstrating completion of the specific activities contained in the undertaking; and
- consultation and agreement with SafeWork SA prior to the release of all public documents including manuals, external forums/conferences or advertising campaigns.

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

The length of the undertaking will be determined by the content of the agreed terms. An undertaking will be concluded on written advice from the Regulator confirming that all requirements of the undertaking have been satisfactorily executed and the undertaking is considered concluded.

Timeframes

A company or individual considering an EU must negotiate a time frame for the submission of the proposal. Early agreement on acceptable timeframes is essential to ensure a timely consideration of the proposal.

A proposal may be refused if there was an unreasonable delay in it being submitted.

Investigations and legal proceedings will continue until a proposed EU is accepted.

Service Standards

The following service standards will generally apply to the management of a proposed undertaking.

- Meeting between the individual or company representative and the relevant Regulator staff – within 21 days of the request.
- Submission of proposed undertaking - within 90 days of receipt of the complaint and summons to allow expeditious processing (limited to matters in which proceedings have been initiated).
- Acknowledgement of receipt letter sent to proposer - 7 days from receipt of proposed undertaking.
- Assessment of proposal with legislative and administrative requirements - 28 days from receipt of proposed undertaking.
- Letter to proposer confirming administrative requirement assessment and if necessary re-submission of proposal - 14 days to submit proposal.
- Review of proposed undertaking - 28 days from receipt.
- Where necessary refinement of the proposal - 7 days from review for Regulator to send letter and 28 days for proposer to re-submit.
- Review of refined proposed undertaking - 28 days from receipt.
- Decision on proposed undertaking - 28 days from referral of matter from review.
- Advice on decision to proposer of undertaking - 14 days from decision having been made.
- Publication of notice of acceptance on website and newspaper - not more than 14 days after advice to proposer of undertaking.

Publication of EUs

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

When an EU is accepted, notice of the decision to accept it and reasons for that decision will be published by the Regulator on the SafeWork SA website within 14 days of the date of the decision.

EUs will not be removed from the public register and will remain on the register after a company or individual has discharged all obligations of the undertaking.

Failure to comply with an EU

Once accepted, an EU is a legally binding agreement and non-compliance is subject to 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 also seek to prosecute the original contravention 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 with the EU in the future.
- Commencement of proceedings for the original alleged contravention.

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 and signed by the Regulator or their delegate.

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 on 7085 1559, email OLST.SWSA@sa.gov.au or visit the SafeWork SA website www.safework.sa.gov.au.