

SafeWork NSW




# Enforceable Undertakings Guidelines

January 2022





A blurred, high-angle photograph of a modern office interior. The scene is viewed through glass partitions, showing people in motion. In the foreground, a man in a blue and white striped shirt is walking towards the right. To his left, another person is partially visible, also in motion. In the background, a person is seated at a desk, and another person is standing near a whiteboard. The office has large windows, modern lighting, and a clean, professional aesthetic. The text is overlaid on a dark blue rectangular background in the center of the image.

Enforceable  
Undertakings  
deliver positive  
safety benefits  
to the workplace,  
industry and/or  
the community

# Introduction

**An alleged contravention of the NSW Work Health and Safety Act 2011 (the Act) or Work Health and Safety Regulation 2017 (the Regulation) is serious.**

Failing to protect workers and others who may be affected by work carried out is a criminal offence which in some instances may warrant prosecution in a court of law. A prosecution is one enforcement option. An enforceable undertaking (EU) is an alternative enforcement option to a prosecution. An EU provides an opportunity for significant work health and safety reform to be undertaken<sup>1</sup>.

SafeWork NSW is the state's work health and safety regulator. We work with NSW workplaces to reduce work related fatalities, serious injuries and illnesses and make it easier to do business safely.

At SafeWork NSW, we aim to make sure our regulatory approaches promote a competitive, confident and protected NSW. In realising this objective, the work health and safety laws provide SafeWork NSW with a range of functions including monitoring and enforcing compliance with the law.

SafeWork NSW secures compliance with work health and safety legislation by way of sanctions, including prosecutions, enforceable undertakings, infringement notices, issuing improvement and prohibition notices, and providing information, education and advice. SafeWork NSW considers the seriousness of the risk and/or offence and the potential for harm in the workplace when determining compliance actions<sup>2</sup>.

## Scope

**One of the objects of the Act is securing work health and safety compliance, through effective and appropriate enforcement measures<sup>3</sup>.**

These guidelines explain the principles SafeWork NSW applies to the use of EUs as an enforcement measure and the approach taken in considering an EU from a person who has allegedly committed an offence against the Act or Regulation.

These guidelines replace SafeWork NSW Enforceable Undertakings Guidelines – January 2018 and Enforceable Undertakings Customer Service Standard – April 2019.

An EU may be accepted by SafeWork NSW in connection with a matter relating to a contravention or alleged contravention by the person of the Act or Regulation.

An EU cannot be accepted for a contravention or alleged contravention that is a Category 1 offence. Please refer to page 3, 'When will an EU not be accepted?' for further information.



1. National Work Health and Safety Compliance and Enforcement Policy, Section 13

2. SafeWork NSW, Our Approach to Work Health and Safety Regulation (catalogue no. SW08027)

3. Work Health and Safety Act 2011, Section 3(1)(e)

## What is an EU?

**An EU is a written promise made by the person entering into the EU to complete certain activities within a particular timeframe.**

Typically, the strategies/initiatives developed within an EU are substantial and will deliver positive safety benefits to the workplace, industry and/or the community. The effort and commitment required of a person responsible for implementing an EU may be substantial, both financially and in terms of human resources.

An evaluation of the EU program revealed an EU delivered long term WHS and culture improvements in 94% of businesses<sup>4</sup>

## Why an EU and not a prosecution?

**An EU can provide a systematic and lasting response, tailored to the nature of the workplace, with broader benefits for the industry and the community. In particular, an EU can be used as a means to improve health and safety.**

A person is already required by law to meet their statutory work health and safety obligations. An EU is intended to achieve work health and safety outcomes in the affected workplace, to the relevant industry and/or the community that strengthen compliance and build sustainable performance.

SafeWork NSW follows the graduated approach to compliance and enforcement adopted by most work health and safety regulators throughout Australia<sup>5</sup>. While every effort is made to support the competitiveness and confidence of business through information and advisory services, SafeWork NSW will enforce compliance with work health and safety laws as appropriate to the relevant circumstances. Where an alleged contravention of work health and safety laws is of a serious nature, the enforcement response will usually involve a high level sanction. High level sanctions include court-imposed penalties obtained via a prosecution of the alleged contravention in a court of law.

SafeWork NSW may accept an EU as an alternative to a prosecution if appropriate, given the circumstances and if it is likely to deliver sustainable work health and safety outcomes.

An EU does not constitute an admission of guilt by the person providing it in relation to the alleged contravention. Court proceedings cannot be brought against a person for the alleged contravention while the EU is being completed.

4. SafeWork NSW Enforceable Undertakings Evaluation, June 2020, go to: [www.safework.nsw.gov.au](http://www.safework.nsw.gov.au)

5. National Compliance and Enforcement Policy, Section 6



## Who can accept or reject an EU?

The decision to accept or reject an EU is made by SafeWork NSW.

## When can I approach SafeWork NSW about an EU?

**Generally, SafeWork NSW will consider an EU after charges have been laid and proceedings have commenced against the relevant person in respect of an alleged contravention.**

An application for an EU should be made as soon as possible following the commencement of proceedings and within 12 weeks from service of the brief of evidence<sup>6</sup>. SafeWork NSW will not enter into discussions about an EU if contacted more than 6 months after the contravention is alleged, unless the applicant can demonstrate exceptional circumstances exist.

## When will an EU not be accepted?

**The Act prohibits the acceptance of an EU for a Category 1 offence<sup>7</sup>.**

A Category 1 offence occurs where a person with a health and safety duty, without reasonable excuse, engages in conduct that exposes an individual to a risk of serious or fatal injury or illness, and the person engages in the conduct with gross negligence or is reckless to that risk.

An EU may also not be accepted as an appropriate enforcement outcome, for matters where SafeWork NSW consider the alleged offending is more appropriately addressed by a court-imposed sanction.

Please refer to page 4, 'What determines whether an EU will be accepted?' for further information.

6. As outlined in the District Court Practice Note 16. To access the District Court practice Note, go to: [www.districtcourt.nsw.gov.au](http://www.districtcourt.nsw.gov.au)

7. Work Health and Safety Act 2011, Section 216(2)

# What determines whether an EU will be accepted?

**The assessment of an EU by SafeWork NSW will involve two stages of consideration; an 'eligibility' assessment followed by an 'evaluation' assessment.**

- 1. Eligibility** The first stage is initiated from an expression of interest by the person to SafeWork NSW about the possibility of an EU. The expression of interest is assessed to determine if an EU may be an appropriate enforcement measure.
- 2. Evaluation** The second stage is initiated when SafeWork NSW determines that an EU may be an appropriate option after assessing the person's eligibility. The person submits a written EU proposal to SafeWork NSW and the merit of the proposal is then considered.

## Injured worker and/or family of deceased worker's view

In determining whether an EU will be accepted, the views of the injured worker and/or family of a deceased worker are important and will be considered as part of the overall assessment of the EU application.



# STAGE 1

## Considerations applicable to ‘eligibility’

**In assessing whether a matter may be determined as eligible for an EU, SafeWork NSW will consider the following factors:**

- the level of alleged **culpability** of the person
- the degree of **risk** arising from the alleged breach
- the person’s history of **compliance**
- the person’s **attitude** and **commitment** to work health and safety and the EU process.

These factors will be considered to determine if an EU is an appropriate enforcement measure.

Should SafeWork NSW determine that a person is not eligible for an EU, the person will be provided a reasonable opportunity to address the reasons prior to a final decision.

## Culpability

**Culpability refers to the nature of the alleged misconduct which gave rise to the contravention.**

Consideration of culpability will involve an examination of the work health and safety management systems and practices of the person. This includes what they knew or what they should have reasonably known about the hazards present in the workplace and what they did or should have reasonably done to eliminate or minimise the risk arising from those hazards. This involves an objective assessment of what action or omission by the person, is considered to have contributed to the risk/incident.

## Risk

**Work health and safety legislation is risk based legislation aimed at preventing exposure to the risk of harm<sup>8</sup>. For this reason, it is the seriousness of the risk arising from the alleged contravention, rather than the consequence of it, that will be considered.**

However, a fatality or a serious injury may provide a clear indication of a failure to eliminate or control risks and will be given significant attention in deciding whether an EU is an appropriate enforcement measure.

Assessment of the seriousness of the risk arising from the alleged contravention will usually involve consideration of the following factors:

- the number of people put at risk
- how long the risk existed
- the degree of consultation that occurred about the risk within the workplace, leading up to the alleged contravention
- the actual or potential consequences of the risk created by the alleged contravention.

8. Work Health and Safety Act 2011, Section 3(1)(a)

## History of compliance

**If there is a history of non-compliance this conduct may lessen the likelihood of an EU being considered an appropriate enforcement measure by SafeWork NSW.**

History of compliance refers to the consideration of any evidence of prior non-compliances with work health and safety laws or other regulatory schemes.

An EU will generally not be appropriate where any of the following circumstances exist:

- the person has two or more prior convictions against the Act, arising from separate investigations, unless the last prior conviction is more than five years prior to the alleged contravention that is the subject of the proposed EU
- if the person has a prior conviction against the Act which was connected to the fatal injury of a person, unless the prior conviction is more than five years prior to the alleged contravention that is the subject of the proposed EU
- the person has two or more prior convictions in other WHS jurisdictions, unless the last prior conviction is more than five years prior to the alleged contravention that is the subject of the proposed EU.

## Attitude and commitment

**A person's attitude and commitment will usually involve consideration of the following factors:**

- how the person responded to the incident from a mitigation and prevention perspective and the support provided to the injured worker and/or family members of a deceased worker
- the attitude demonstrated by the person in communicating with SafeWork NSW
- how the person and/or management demonstrates commitment to the EU process, including meeting agreed actions and timeframes
- how the person and/or management demonstrates a positive work health and safety culture within the workplace.



## STAGE 2

### Considerations applicable to ‘evaluation’

If SafeWork NSW decides that an EU is potentially appropriate following an assessment for eligibility, the second stage is where the merit of a proposed EU is considered.

At this stage, the person prepares and submits a written EU proposal using the template SafeWork NSW provides.

The proposal will be assessed by SafeWork NSW with consideration to the following factors:

- the degree to which the EU strengthens compliance and/or builds sustainable performance
- whether the EU offers sustainable, measurable and tangible **work health and safety benefits** to:
  1. the workplace
  2. the industry
  3. the community
- the extent to which some of the strategies/initiatives proposed **link to the alleged contravention** and the work health and safety duties of the person, or where this is not viable, achieve benefits to work health and safety outcomes in general
- the person’s **capability** to develop and deliver an EU
- the person’s **attitude** and **commitment** to the EU process (please refer to page 6 ‘attitude and commitment’)
- any other matter that SafeWork NSW considers relevant to the merit of and compliance with the EU.

### Capability

**A person’s capability will be assessed against the following factors:**

- the person’s ability and competence to develop an EU within the prescribed timeframe
- the person’s ability to deliver and complete the EU, both in terms of financial capacity and human resources.

# Worker EUs

**The assessment of an EU from a worker as an alternative to prosecution if appropriate, will follow the same two staged EU approach of an ‘eligibility’ assessment followed by an ‘evaluation’ assessment, however some of the assessment considerations may vary.**

## **Stage 1: Considerations applicable to ‘eligibility’**

In assessing whether a worker may be determined as eligible for an EU, SafeWork NSW will consider the following factors:

- the level of alleged **culpability** of the worker
- the degree of **risk** arising from the alleged breach
- the worker’s **attitude** and **commitment** to work health and safety and the EU process.


## **Stage 2: Considerations applicable to ‘evaluation’**

If SafeWork NSW decides that an EU is appropriate following an assessment for eligibility, the second stage is where the merit of an EU is considered.

At this stage, the worker prepares and submits a written EU proposal, using the template SafeWork NSW provides.

The proposal will be assessed by SafeWork NSW with consideration to the following factors:

- the degree to which the EU strengthens the worker’s capability and commitment towards work health and safety
- whether the EU offers sustainable, measurable and tangible **work health and safety benefits** to:
  1. the worker
  2. the workplace
  3. the industry
- the worker’s **capability** to develop and deliver an EU
- the worker’s **attitude** and **commitment** to the EU process (please refer to page 6 ‘attitude and commitment’)
- any other matter that SafeWork NSW considers relevant to the merit of and compliance with the EU.

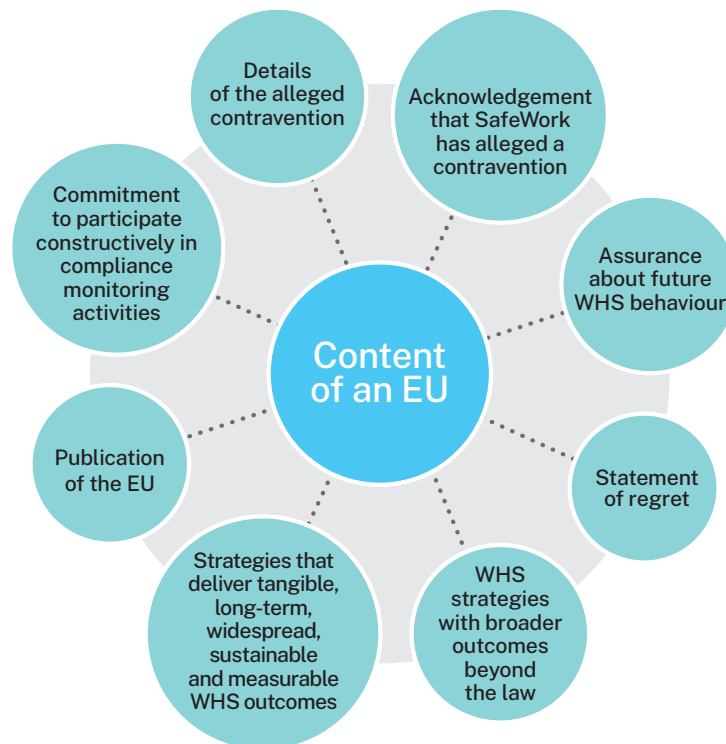


Prosecution proceedings may be adjourned to enable consideration of an EU. If an EU is rejected, then the prosecution proceedings will resume.



# Preparing an EU

The following diagram outlines what must be included in an EU proposal:



The proposal will be considered by SafeWork NSW, subject to it containing all relevant procedural information and sufficient detail in relation to proposed strategies/initiatives, actions, milestones, costs and other information as requested.

## The EU evaluation decision by SafeWork NSW

**Should SafeWork NSW intend to reject a proposed EU, the person will be provided a reasonable opportunity to address the reasons prior to a final decision.**

Should an EU be rejected, the person will be provided with written reasons.

Should an EU be accepted, reasons for acceptance and the full EU, will be published on the SafeWork NSW website<sup>9</sup>.

9. An EU is removed from the SafeWork NSW website when completed

## Breaches of accepted EUs

**Once an EU is accepted, it is legally binding. Failure to comply with the terms of the EU is a breach of the Act.**

As an EU is enforceable by the court, a breach may result in significant sanctions including:

- a direction to comply with the EU
- discharge of the EU
- monetary fines
- an order to pay court costs
- an order to pay SafeWork NSW costs in monitoring compliance with the enforceable undertaking in the future
- commencement of proceedings for the original alleged contravention.

## What you can expect from us

SafeWork NSW will:

- offer you guidance in the preparation of your EU and keep you informed of its progress
- be proactive in processing your EU
- make sure our decisions and actions are fair, reasonable, transparent and appropriate
- communicate regularly with you throughout the process.

## What we will not do

SafeWork NSW will not:

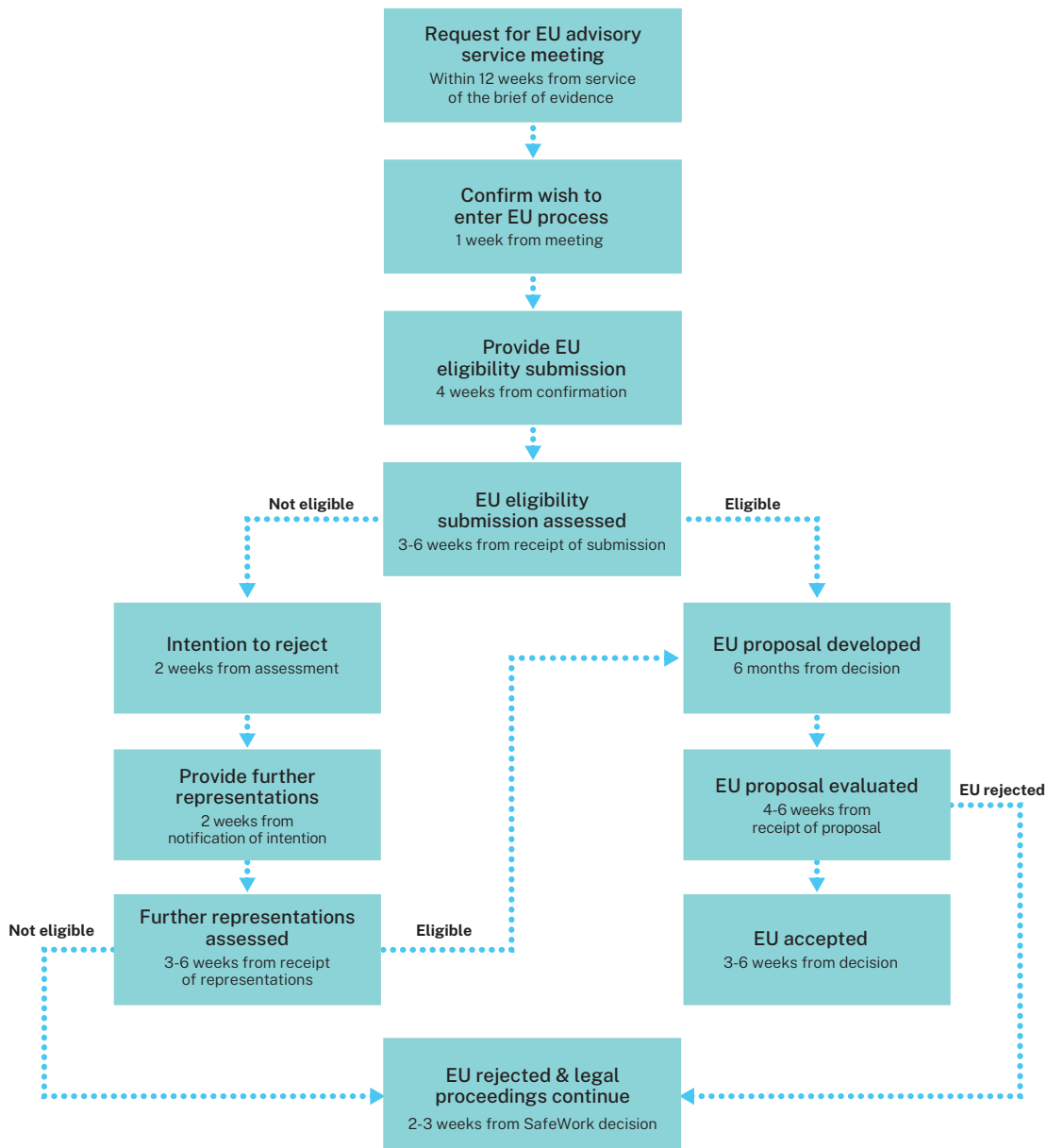
- force you to enter into an EU
- prepare an EU on your behalf
- provide legal advice.

## How you can help us help you

- engage SafeWork NSW as soon as possible following the commencement of proceedings
- provide SafeWork NSW with any information that is requested of you
- meet agreed timeframes
- keep SafeWork NSW informed of the progress of your EU
- tell SafeWork NSW in advance if you can't meet deadlines
- be committed to the process
- be capable of meeting the EU outcomes
- ensure you refer to the EU Guidelines throughout the process.

# Timeframes

- This diagram shows the important steps in the EU process including associated timeframes.
- These timeframes are a guide only and do not cover every conceivable situation or circumstance. Therefore, the time taken to negotiate an EU may be shorter or longer than indicated below<sup>10</sup>.



10. Timeframes to develop an EU proposal may vary. On average, development of an EU proposal may take between 5 and 10 months.



## Further information

These EU Guidelines are supported and endorsed by the Executive Director, Investigations and Enforcement, as the SafeWork NSW delegate.

For further information, please contact the EU Advisory Service on 13 10 50, or email [enforceable.undertakings@safework.nsw.gov.au](mailto:enforceable.undertakings@safework.nsw.gov.au), or visit our website [www.safework.nsw.gov.au/law-and-policy/enforcement/enforceable-undertakings](http://www.safework.nsw.gov.au/law-and-policy/enforcement/enforceable-undertakings)

## Privacy information

Information collected by SafeWork NSW (the Regulator) will be maintained by the Regulator on an internal database and used to assist the Regulator and its inspectorate with its work generally. It may also be provided to other state, territory and the commonwealth regulatory authorities. Except for the purposes of prosecution and unless such disclosure is otherwise required by law, the information will not be accessed by other third parties in a way that would identify the individual without the consent of that individual. You may also apply to the Regulator to access and correct any information about yourself if inaccurate, incomplete, not relevant or out of date. Applications should be made in writing to: Privacy Contact Officer, SafeWork NSW, Locked Bag 2906, Lisarow, NSW 2252.

## Disclaimer

This publication may contain information about the regulation and enforcement of work health and safety in NSW. It may include some of your obligations under some of the legislation that SafeWork NSW administers. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

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SafeWork NSW, 92-100 Donnison Street,  
Gosford. NSW 2250.  
Locked Bag 2906, Lisarow, NSW 2252.

SafeWork NSW Customer Experience 13 10 50  
Website [www.safework.nsw.gov.au](http://www.safework.nsw.gov.au)

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