

Enforceable undertakings guidelines

These guidelines set out the approach NT WorkSafe takes to considering an offer of an enforceable undertaking from a person who has allegedly committed an offence against the Act.

NT WorkSafe is the Northern Territory's work health and safety regulating Agency, which works with the NT community to reduce work related fatalities, serious injuries and illnesses and make it easier to do business safely. In realising this objective, the work health and safety laws, provide NT WorkSafe with a range of functions including monitoring and enforcing compliance with the law.

The Act imposes health and safety duties on all persons conducting businesses or undertakings in the Northern Territory as well as their officers and workers.

NT WorkSafe secures compliance by using enforcement tools such as improvement and prohibition notices, infringements and sanctions, based on the seriousness of the risk and/or offence and the potential for harm in the workplace.

A contravention of the Act is serious. Failing to protect workers and others, who may be affected by that work, is a criminal offence, which may warrant prosecution in a court of law. A court imposed sanction or a prosecution is one enforcement option.

An enforceable undertaking is an alternative enforcement option to a prosecution.

Scope

These guidelines set out the approach NT WorkSafe takes in considering an offer of an enforceable undertaking from a person who has, or allegedly has, committed a contravention against the Act.

These guidelines explain the principles NT WorkSafe applies to the use of enforceable undertakings as an enforcement measure.

One of the objects of the Act is securing compliance with the Act through effective and appropriate compliance and enforcement measures¹.

The Regulator may accept a written enforceable undertaking given by a person in connection with a matter relating to an, or alleged, contravention of the Act by the person.

An enforceable undertaking will not be accepted for a contravention, or alleged, contravention that is a category 1 or an industrial manslaughter offence. Please refer to the section '*when will an enforceable undertaking not be accepted?*' for further information.

What is an enforceable undertaking?

An enforceable undertaking is a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings (courts) for an alleged contravention of the Act. An enforceable undertaking provides an opportunity for significant work health and safety reform to be undertaken².

The commitments required under an enforceable undertaking are substantial and will include specific initiatives by the person that will deliver tangible, measurable and ongoing safety benefits to the workplace, as well as benefits, which extend to the industry and community.

The aims of an enforceable undertaking is to protect workers and others from future events that lead to the alleged contravention; create and offer improvements to a company and industry systems through lessons learnt; increase safety in the Industry and assist in public safety.

The effort and commitment required of a person in delivering the initiatives within an enforceable undertaking to completion are significant in terms of cost and resources.

Why an enforceable undertaking and not a prosecution?

A person is already required by law to meet their statutory work health and safety obligations. An enforceable undertaking is intended to achieve improved work health and safety outcomes for workers in the affected workplace and beyond to the relevant industry and our community that strengthens compliance and/or builds sustainable performance.

NT WorkSafe follows the graduated approach to compliance and enforcement adopted by most work health and safety Regulators throughout Australia³. While every effort is made to support the competitiveness and confidence of business through information and advisory services, NT WorkSafe 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 may involve a high-level sanction including court-imposed penalties obtained via a prosecution of the alleged contravention in a court of law.

The Regulator may accept an enforceable undertaking as an alternative to a prosecution if appropriate given the circumstances, and if it is likely to deliver superior work health and safety outcomes to a court sanction.

In some instances, an enforceable undertaking may be a preferred approach to a prosecution because it is expected to achieve outcomes that cannot generally be achieved through the court process. The range of actions available through an enforceable undertaking can provide a more systematic and enduring response, tailored to the nature of the non-compliance with broader benefits for the industry and community. In particular, an enforceable undertaking can be used as an incentive to improve health and safety rather than as a punishment for having failed to comply with work health and safety laws.

An enforceable undertaking 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 to which an enforceable undertaking relates while the accepted enforceable undertaking is in effect and is being complied with.

Who can accept or reject an enforceable undertaking?

The decision to accept or reject an enforceable undertaking is made by the Regulator.

The process of assessing an application to enter into an enforceable undertaking is made by NT WorkSafe.

When can an enforceable undertaking be proposed?

The Regulator may accept a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention by the person of this Act.

Generally, the Regulator will consider interest in an enforceable undertaking after charges have been laid and proceedings have commenced against the person in respect of an alleged contravention.

When will an enforceable undertaking not be accepted?

The Act prohibits the acceptance of an enforceable undertaking for a category 1⁴ or industrial manslaughter offence. A category 1 offence is one where a person, without reasonable excuse, engages in conduct that exposes an individual to a risk of fatal or serious injury or illness and the person is reckless to that risk. Industrial manslaughter is where reckless or negligent conduct has caused a workplace fatality.

There are some situations where an enforceable undertaking may not be accepted as an appropriate enforcement outcome. For example, the alleged contravention may be of such a serious nature that a prosecution is warranted and the Regulator will seek a court imposed sanction. Please refer to the section, *'What determines whether an enforceable undertaking will be accepted?'* for further information.

What determines whether an enforceable undertaking will be accepted?

The Regulator will consider an enforceable undertaking as an alternative to a prosecution if doing so is in the public interest and the person proposing the enforceable undertaking is able to demonstrate that the enforceable undertaking will deliver tangible, measurable and ongoing work health and safety benefits to the workplace, industry and community. The assessment by NT WorkSafe of a proposed enforceable undertaking 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 the Regulator about the possibility of an enforceable undertaking. It involves consideration as to whether an enforceable undertaking may be an appropriate enforcement measure, taking into account the circumstances of a particular incident and the compliance history of the person.

2. **Evaluation** – The second stage is initiated when the Regulator determines that an enforceable undertaking may be a viable option after assessing the person's eligibility. The person submits a written enforceable undertaking proposal to NT WorkSafe and the merit of the proposal is then considered.

Stage 1: Considerations applicable to 'eligibility'

In assessing whether a matter may be determined as eligible for an enforceable undertaking, NT WorkSafe will consider the following factors:

- the level of alleged **culpability** of the person;
- the degree of **risk** arising from the alleged offence; and
- the person's history of **compliance** with the Act.

These factors are considered as part of the public interest test in accordance with the national compliance and enforcement policy. The guidelines note that public interest is the paramount concern to be taken into account in the decision to prosecute. The public interest test always informs NT WorkSafe's approach to breaches of work health and safety laws.

However, the factors listed above will be reconsidered in the context of an expression of interest by a person, to determine if an enforceable undertaking is an appropriate enforcement measure. The relative weight given to each factor will depend on the particular circumstances of the alleged contravention and the compliance history of the person.

Should the Regulator determine that a person is not eligible for an enforceable undertaking, the person will be provided a reasonable opportunity to address the reasons prior to a final decision by the Regulator.

Culpability

Culpability refers to the extent to which the person may be held responsible for the incident and the nature of the alleged contravention.

Consideration of culpability will involve an examination of the work health and safety management practices of the person, including 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 failure to act by the person, is considered to have contributed to the incident.

Risk

Work health and safety legislation is performance based legislation, aimed at preventing exposure to the risk of harm⁵. For this reason, it is the seriousness of the risk arising from the alleged breach rather than the consequence of the breach that will be considered. However, a fatality or a serious injury may provide a clear indication of a failure to control risks and will be given significant attention in deciding whether an enforceable undertaking 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:

1. the number of people put at risk;
2. how long the risk existed;
3. the degree of consultation that occurred within the workplace; and
4. the actual or potential consequences of the risk created by the alleged contravention.

The views of the injured worker and/or family are important to NT WorkSafe. Those views can shed some light on the extent to which workers were exposed to the risk of harm and the effectiveness of measures to control those risks. Accordingly, the views of the injured worker and/or family will be considered as part of the assessment.

History of compliance

History of compliance refers to the consideration of any evidence of prior non-compliance with work health and safety obligations, whether the person was notified of their obligations by NT WorkSafe, and the behaviour of the person in response to previous enforcement and prevention action.

The compliance history of the person will be assessed against a background of seriousness and/or relevance of the compliance history to the alleged contravention when deciding whether an enforceable undertaking may be an appropriate enforcement measure.

If there is a history of non-compliance and the person has previously shown insufficient regard for compliance with work health and safety laws, this behaviour may lessen the likelihood of an enforceable undertaking being considered an appropriate enforcement measure by NT WorkSafe.

An enforceable undertaking will generally not be appropriate where the person has prior convictions or findings of guilt under the Act.

Stage 2: Considerations applicable to 'evaluation'

If the Regulator decides that an enforceable undertaking is appropriate following an assessment for eligibility, the second stage is where the merits of a proposed enforceable undertaking are considered.

At this stage, the person submits a written enforceable undertaking proposal. The proposal should include essential details that demonstrate the improved safety values. The content of the proposed enforceable undertaking will be evaluated against a backdrop of work health and safety outcomes that are required from the enforceable undertaking.

Given that consideration of culpability, risk and compliance history has previously been undertaken, the proposal will be assessed by NT WorkSafe with consideration of the following factors (but not limited to):

- the degree to which the enforceable undertaking strengthens compliance and/or builds sustainable performance, beyond the person's obligations to comply with the Act;
- whether the enforceable undertaking offers long term, sustainable, measurable and tangible work health and safety benefits to:
 - the workplace; and
 - the industry; and
 - the community.
- the extent that the strategies proposed link to the alleged contravention and the work health and safety duties of the person;
- the person's conduct in respect of mitigation and remedial action regarding both the alleged contravention and any person effected by the alleged contravention;
- support provided to the injured person(s) or proposed to be provided to the injured person(s) to overcome the injury/illness and recover at work;
- whether the person is likely to comply with the enforceable undertaking; and
- any other matter that NT WorkSafe considers relevant to the merit of and compliance with the enforceable undertaking.

Preparing an enforceable undertaking

To allow for the timely development and effective monitoring of an enforceable undertaking, the proposal will need to contain certain information and a number of mandatory terms. The following diagram outlines what is typically included in an enforceable undertaking proposal⁶.



This graph outlines the content of an enforceable undertaking

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

Prosecution proceedings may be adjourned to enable consideration of an enforceable undertaking. If an enforceable undertaking is rejected, then the prosecution proceedings will continue.

The enforceable undertaking evaluation decision by the Regulator

Should the Regulator reject a proposed enforceable undertaking, the person will be provided a reasonable opportunity to address the reasons prior to a final decision by the Regulator.

Should an enforceable undertaking be rejected by the Regulator, the person will be provided with written reasons.

Should an enforceable undertaking be accepted by the Regulator, it will be published on the NT WorkSafe website. NT WorkSafe will provide reasons for acceptance of an enforceable undertaking on its website.

Variation of an accepted enforceable undertakings

The Regulator will only consent to vary an enforceable undertaking where the person can demonstrate

- certain terms are found to be unforeseeably impractical or ineffective and amendment is necessary to rectify issues with the enforceable undertaking to allow compliance;
- there has been a material change in the circumstances to which the enforceable undertaking relates;
- there are extenuating reasons provided for the Regulator to consider;
- An appropriate regulatory outcome would still be achieved with the proposed variation

The Regulator will not consent to a variation of an enforceable undertaking where the Regulator considers that doing so could undermine the stated objects of the WHS Act, reduces the benefits that would have been achieved from the accepted enforceable undertaking or if it adversely affect any person or provides for a different alleged contravention.

Any variation is evaluated in conjunction with the original enforceable undertaking and must be either accepted or rejected by the Regulator.

Contravention of accepted enforceable undertakings

It is an offence to contravene an enforceable undertaking. Once an enforceable undertaking is accepted, it is legally binding.

A breach of an enforceable undertaking involves failure to comply with the terms of the enforceable undertaking.

As an enforceable undertaking is enforceable by the court, a breach may result in significant penalties including

- monetary fines
- a direction to comply with the enforceable undertaking;
- discharge of the enforceable undertaking;
- court costs including NT WorkSafe's;
- NT WorkSafe costs in monitoring compliance with the enforceable undertaking in the future; and/or
- commencement of proceedings for the original alleged contravention.

References:

1. **Work Health and Safety Act 2011, Section 3(1)(e)**
(<https://legislation.nt.gov.au/Legislation/WORK-HEALTH-AND-SAFETY-NATIONAL-UNIFORM-LEGISLATION-ACT-2011>)
2. **National Compliance and Enforcement Policy, Section 13**
(<https://www.safeworkaustralia.gov.au/doc/national-compliance-and-enforcement-policy>)
3. **National Compliance and Enforcement Policy, Section 6**
(<https://www.safeworkaustralia.gov.au/doc/national-compliance-and-enforcement-policy>)
4. **Work Health and Safety Act 2011, Section 216(2)**
(<https://legislation.nt.gov.au/Legislation/WORK-HEALTH-AND-SAFETY-NATIONAL-UNIFORM-LEGISLATION-ACT-2011>)
5. **Work Health and Safety Act 2011, Section 3(1)(a)**
(<https://legislation.nt.gov.au/Legislation/WORK-HEALTH-AND-SAFETY-NATIONAL-UNIFORM-LEGISLATION-ACT-2011>)
6. **NT WorkSafe, Enforcement Undertakings Customer Service Standard**
(<https://worksafe.nt.gov.au/forms-and-resources/bulletins/enforceable-undertakings-customer-service-standard>)