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# Enforcement Group

Policy on Enforceable Undertakings pursuant to section 16 of  
the *Occupational Health and Safety Act 2004*

Version 3

23 January 2018

**Amendment History**

<b>Version</b>	<b>Description of Change</b>	<b>Changes by</b>	<b>Date</b>	<b>Reviewed by</b>	<b>Approved by</b>
1	Final Version	N/A	October 2017		
2	Updated	Cheryl Richardson	March 2017	Dmitry Rozkin	
3	Updated	Alana Ziebell	January 2018	Rachelle Oberklaid	

# WorkSafe Victoria

## Enforceable Undertakings

### 1. Scope

- 1.1. This policy sets out WorkSafe Victoria's (WorkSafe) processes and criteria for considering an offer of an Enforceable Undertaking (EU) from a person who has allegedly committed an offence against the *Occupational Health and Safety Act 2004* (the Act).
- 1.2. WorkSafe's General Prosecution Guidelines (the Guidelines) are published in the Government Gazette and on [www.worksafe.vic.gov.au](http://www.worksafe.vic.gov.au). The Guidelines set out the criteria for, and approach to, prosecution decisions. They guide WorkSafe on the exercise of its prosecutorial discretion.
- 1.3. This policy is consistent with, and supports, the Guidelines and the Act. This policy in no way replaces or adds to any of the principles set out in the Guidelines and the Act. This policy should be read in the context of, and subject to, the Guidelines.
- 1.4. This policy will be kept under regular review and may be modified by WorkSafe at any time.
- 1.5. All prosecution-related activities are conducted by WorkSafe's Enforcement Group.

### 2. Background

- 2.1. In the event of a contravention against the Act, WorkSafe may accept an EU given in writing by a person who allegedly committed the contravention pursuant to section 16 of the Act (the applicant).
- 2.2. An EU is a written undertaking which contains commitments by the applicant to do certain things within a particular timeframe. The acceptance of an EU by WorkSafe is an alternative to prosecution of the applicant in respect of the particular contravention.
  - 2.2.1. An EU does not constitute an admission or a finding of guilt. Where a charge or charges have already been laid against the applicant in respect of the contravention, such charges are withdrawn upon acceptance of the EU.
  - 2.2.2. An EU that has already been accepted from an applicant can be varied, but only by agreement with WorkSafe.
- 2.3. All EU discussions and negotiations are without prejudice and will not be used by either party in the proceeding.

### 3. Enforceability

- 3.1. A person who gives an undertaking must not contravene the undertaking. When it comes to the notice of the Authority that the undertaking has been contravened, WorkSafe will notify the person who provided the undertaking.
- 3.2. If an undertaking accepted by WorkSafe has not been fully complied with and discharged, the Authority may:
  - 3.2.1. Apply to the Magistrates' Court for enforcement of the undertaking; and
  - 3.2.2. Investigate the contravention for possible offences against section 16(3) of the Act; and
  - 3.2.3. Reinstate the charges that were withdrawn on the WorkSafe's acceptance of the EU.

### 4. Reinstatement of the Prosecution

- 4.1. WorkSafe will not prosecute the offence which was originally the subject of the undertaking while the undertaking is in effect or if the undertaking has been fully complied with and discharged (Section 16(4) of the Act). However, WorkSafe may prosecute the offence which

was originally the subject of the undertaking if the undertaking is contravened or withdrawn (Section 132 of the Act).

## 5. Who can Accept or Reject an EU

- 5.1. The decision to accept or reject an EU can only be made by WorkSafe.

## 6. Procedural Fairness

- 6.1. An applicant will be provided a reasonable opportunity to make a submission to WorkSafe regarding any matter that WorkSafe takes into account in making its decision or upon which the decision is based. The opportunity to make a submission to WorkSafe will be afforded to the applicant at an appropriate stage as outlined in this policy.
- 6.2. The applicant may choose to withdraw its offer of an EU at any stage prior to WorkSafe's acceptance. The Authority is taken to have accepted an EU when it is signed by WorkSafe's General Counsel.

## 7. Stage when an EU can be proposed

- 7.1. An EU may be offered prior to any charges being laid.
- 7.2. If the charges have been laid, an applicant should provide an indication to WorkSafe of their intention to submit an EU to WorkSafe as soon as possible but no later than three months after the brief of evidence is served.
- 7.3. An EU offered by an applicant at a stage where proceedings have been listed by a court for a contested court hearing or a plea of guilty is less likely to be accepted.
- 7.4. WorkSafe will oppose any application for an adjournment of a substantive hearing (contested committal or contested hearing) that has been listed due to a late submission of an EU proposal.
- 7.5. Proceedings already committed to trial are conducted by the Director of Public Prosecutions to whom this policy does not apply.

## 8. General Exclusions

- 8.1. EUs are not appropriate where any of the following circumstances exist, and the EU will be rejected, unless WorkSafe accepts that exceptional circumstances exist:
    - Death:** The contravention is connected to the death of a person, whether or not the contravention can be said to have directly caused the death.
    - Serious breach /High culpability:** Matters involving significant departure from the duty owed.
    - Section 32 offence:** The contravention involves reckless endangerment, being an alleged contravention against section 32 of the Act.
    - Criminal history – death:** The applicant has a recent prior conviction or finding of guilt against the Act which was connected to the death of a person, whether or not the prior matter is said to have directly caused the death, unless the prior matter was more than 5 years prior to the contravention the subject of the proposed EU.
    - Criminal history - repeated:** The applicant has two or more recent prior convictions or findings of guilt against the Act arising from separate investigations, unless the last prior matter concluded more than 5 years prior to the contravention the subject of the proposed EU.
- Note:** The criminal history of associated corporate entities such as holding companies and wholly owned subsidiaries is included for the purposes of determining the criminal history of the applicant in all considerations.

## 9. General Exclusions Process

- 9.1. If a proposed EU or applicant falls into any of the four categories of General Exclusion in paragraph 8, the applicant will be informed in writing of the relevant category of General Exclusion applicable to the EU and that the EU will be rejected.
- 9.2. The applicant is provided the opportunity to make submissions to WorkSafe which identify any exceptional circumstances which exist that demonstrate that an EU would be more appropriate than WorkSafe pursuing a prosecution.

## 10. Basic Content Requirements of an EU

- 10.1. The applicant should refer to the WorkSafe website and particularly to the accepted EUs which have been published as a guide. A template EU is also available in the Applicant Guide.
- 10.2. This list is not exhaustive but the applicant should ensure that prior to submitting the EU that:
  - 10.2.1. The applicant has been correctly identified;
  - 10.2.2. The alleged contraventions are described in accordance with the evidence and in a manner acceptable to WorkSafe;
  - 10.2.3. No persons other than the applicant are identified;
  - 10.2.4. The EU has an end date or period within which the undertakings must be completed;
  - 10.2.5. The EU has a provision or provisions which enable WorkSafe to monitor that the undertakings are progressing and ultimately completed, such as timeframes for delivery of reports or other evidence of completion to WorkSafe;
  - 10.2.6. The EU does not contain any terms which provide the applicant excuses or defences for the non-performance of undertakings within the EU;
  - 10.2.7. The EU does not contain any terms which seek to limit WorkSafe's power in relation to any future contraventions or attendances on the applicant;
  - 10.2.8. The EU does not contain undertakings which rely on the cooperation or involvement of a third party, unless there is written consent of the third party;
  - 10.2.9. The EU does not contain any denial of liability/guilt (but it need not contain any admission of liability/guilt);
  - 10.2.10. The EU does not seek to blame another person or entity for the alleged contravention;
  - 10.2.11. The EU acknowledges the enforceability of the EU and the consequences of contravening any of the undertakings which may include prosecution for the alleged contravention which is the subject of the EU;
  - 10.2.12. The EU acknowledges that WorkSafe will publish the EU on its website and publicise the proposed or delivered undertakings;
  - 10.2.13. There is an assurance from a financial controller of the applicant that the applicant can meet its financial obligations under the EU;
  - 10.2.14. The EU acknowledges that each party to the EU will bear its own costs.

## 11. EU Evaluation Criteria

- 11.1. In light of the nature and extent of the acts and omissions which led to the alleged contravention, the EU will be assessed for the quality of the undertakings proposed and the extent to which they achieve improvements in health and safety generally, and the degree to which the undertakings deliver benefits beyond compliance with the law.
- 11.2. There is no requirement that the undertakings offered within the EU address the root cause of any incident or directly relate to the contravention, particularly where such matters have already been addressed voluntarily or via other means of enforcement.
- 11.3. The Secondary Criteria below impact and help to guide the evaluation of the Essential Criteria.

**The Essential Criteria**

- 11.4. Having regard to the Secondary Criteria, the EU is assessed against these Essential Criteria:
- 11.4.1. The EU extends beyond the applicant's obligations to comply with the Act or the *Occupational Health and Safety Regulations 2007 and 2017*;
  - 11.4.2. The EU offers tangible health and safety benefits to improve health and safety outcomes in the workplace/the workforce, the industry and the community.
  - 11.4.3. The EU is in the public interest.

**The Secondary Criteria**

- 11.5. The Secondary Criteria to be applied to the consideration of the Essential Criteria are:
- 11.5.1. The significance and seriousness of the contravention;
  - 11.5.2. The injuries arising from the contravention;
  - 11.5.3. The prevalence of the risks arising from the contravention;
  - 11.5.4. Any aggravating circumstances which exist (e.g. specific knowledge about the hazard or risk; relevant compliance history);
  - 11.5.5. The prior criminal history of the applicant;
  - 11.5.6. Whether the applicant is likely to comply with the EU;
  - 11.5.7. That the EU is capable of enforcement;
  - 11.5.8. The EU does not include a denial of responsibility or the attribution of responsibility to another party.

## **EU EVALUATION PROCESS**

### **STEP 1 – EU OFFER IS MADE**

- The EU should be submitted to the Enforcement Group no later than three months after the brief of evidence is served – see para 7.
- The General Exclusions Process will be applied – see para 8-9. If WorkSafe decides to reject the EU at this stage, the applicant will be provided with a Notice of Decision.
- WorkSafe may decide not to reject the EU after consideration of an applicant's submission, and the EU Evaluation Process will continue.
- The Basic Content requirements will be applied – see para 10. If an EU does not meet the Basic Content requirements it will be returned to the applicant.
- Where proceedings are on foot, the Court will be advised that the applicant has offered an EU which will require consultation and evaluation. The applicant will attend Court to make applications for the adjournment of proceedings where required, and WorkSafe will not oppose such applications where EU negotiations are progressing.

### **STEP 2 – EU IS EVALUATED**

- An EU Panel comprised of internal stakeholders then evaluates the EU. The membership of the EU Panel will be formed on a case by case basis, and will include a Director/Manager of the area/s or industry where the contravention occurred or is impacted by the EU.
- The role of the EU Panel is to assist WorkSafe in its decision-making by evaluating and making a recommendation in relation to an EU.
- The EU Panel will be provided with the following material:
  - i. A copy of the EU;
  - ii. A copy of the charges (if any);
  - iii. Statement of facts;
  - iv. Information regarding any other parties also charged;
  - v. Information regarding any injured person;
  - vi. Compliance history of the applicant (previous inspector visits, notices issued)
  - vii. Any prior criminal history and any applicant submissions given under the General Exclusion process in para 9;
  - viii. A chronology of the proceeding.

### **STEP 3 – EU PANEL RECOMMENDATION AND PROCEDURAL FAIRNESS**

- The EU Panel will consider the EU Evaluation Criteria and will make a recommendation to accept or reject the EU.
- If the EU Panel is of the view that the EU should be rejected, the applicant will be provided with written reasons of the EU Panel. The EU Panel will not formalise its recommendation until the applicant has been afforded the opportunity to address the written reasons.
- The applicant may wish to address the written reasons by amending and resubmitting the EU, or may present to and discuss the EU with at least one member of the EU Panel. A lawyer from the Enforcement Group will also attend such presentation. Following the presentation the applicant may decide to amend and resubmit the EU in consideration of the discussions at the presentation.
- The EU Panel will then formalise its recommendation that an EU be rejected or accepted which will be provided to the WorkSafe delegate for WorkSafe to make its decision.

## STEP 4 – WORKSAFE DECISION

### **EU Panel Recommend Rejection**

- Where the EU Panel has recommended the EU be rejected, the EU will be signed by the applicant for WorkSafe to consider the EU Evaluation Criteria and the EU Panel recommendation to reject the EU, and make its decision.
- If WorkSafe decides to reject the EU, the applicant will be provided the Notice of Decision.<sup>1</sup>
- Any court proceedings will continue or a proceeding filed where it is yet to be commenced.
- All EU discussions and negotiations are without prejudice and will not be used by either party in the proceeding.

### **EU Panel Recommend Acceptance**

- Where the EU Panel has recommended an EU be accepted, the EU will be signed by the applicant for WorkSafe to consider along with the EU Evaluation Criteria and the EU Panel recommendation to accept the EU, and make its decision.
- The investigator, the inspector and the injured person or family may be consulted and each of their views about acceptance of the EU sought.
- In matters of concern to the Director of Public Prosecutions, the EU will be discussed with representatives of the Office of Public Prosecutions.
- WorkSafe will then take into account the EU Panel recommendation to accept the EU, the view of the injured person or family, the investigator and inspector, and the representative of the DPP where relevant.
- If WorkSafe decides to accept the EU, it will be signed and provided to the applicant. The EU is then enforceable and any proceedings on foot against the applicant will be withdrawn.<sup>2</sup>
- Neither the applicant nor WorkSafe will make any application for costs as agreed in the EU.
- The EU will be publicised on the WorkSafe website and a media release or other promotions may be undertaken.
- The delivery of the EU undertakings will be monitored by WorkSafe.
- WorkSafe will enforce compliance with the EU where necessary in accordance with the Act.

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<sup>1</sup> In some circumstances, WorkSafe may decide to accept an EU that has not been recommended by the EU Panel. In such circumstances, the EU will be signed and exchanged between WorkSafe and the applicant. The EU is then enforceable and any proceedings on foot against the applicant will be withdrawn.

<sup>2</sup> In some circumstances, WorkSafe may decide to reject an EU that has been recommended by the EU Panel. In such circumstances, the applicant will be provided the Notice of Decision including the reasons for the decision.



## WorkSafe Victoria

### WorkSafe Advisory Service

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Mulgrave.....	03 9565 9444
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