

Australian Capital Territory

Work Health and Safety (WHS Undertakings) Guidelines 2018 (No 1)

Notifiable instrument NI2018–114

made under the

Work Health and Safety Act 2011, section 230 (Prosecutions)

1 Name of instrument

This instrument is the *Work Health and Safety (WHS Undertakings) Guidelines 2018 (No 1)*.

2 Commencement

This instrument commences on the day after notification.

3 Notification

I make the WHS Undertakings Guidelines as set out in Schedule 1.

Greg Jones
Delegate of the Regulator
1 March 2018



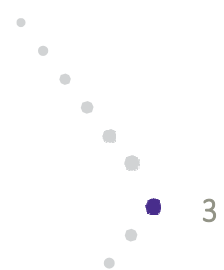
ENFORCEABLE UNDERTAKINGS GENERAL GUIDELINES



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Version 2018:1

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1. INTRODUCTION

This document provides general guidelines in relation to the acceptance of WHS undertakings under the *Work Health and Safety Act 2011* (WHS Act).

If you are intending to propose an enforceable undertaking, you should also read the other publications and fact sheets on enforceable undertakings available at the Access Canberra website: www.accesscanberra.act.gov.au/

1.1. DEFINITIONS

Meanings of particular words used within this document:

- > **Category 1 offence** – a person commits a category 1 offence if:
 - (a) the person has a health and safety duty; and
 - (b) 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
 - (c) the person is reckless as to the risk to an individual of death or serious injury or illness.
- > **Category 2 offence** – a person commits a category 2 offence if:
 - (a) the person has a health and safety duty; and
 - (b) the person fails to comply with that duty; and
 - (c) the failure exposes an individual to a risk of death or serious injury or illness.
- > **Category 3 offence** – a person commits a category 3 offence if:
 - (a) the person has a health and safety duty; and
 - (b) the person fails to comply with that duty.
- > **Enforceable undertaking** – a written undertaking proposed by a person in connection with a matter relating to an alleged contravention by the person of the WHS Act. Once accepted by the regulator a work health and safety (WHS) undertaking becomes enforceable. A work health and safety undertaking provided for in part 11 of the WHS Act is referred to by Access Canberra as an ‘enforceable undertaking’ or ‘undertaking’.
- > **WHSMS** – a work health and safety management system.
- > **Term of an undertaking** – is something for which the person can be held accountable if the undertaking is accepted.
- > **The person** – the duty holder who proposes a WHS undertaking and against whom the undertaking becomes enforceable if accepted. The term includes a reference to a body corporate, the crown in the right of the Territory and a public authority as well as an individual.
- > **Very serious injury** – for this publication, is an injury that has caused nervous system damage liable to lead to mental incapacity or permanent restriction of mobility or involves a major amputation of a limb or parts of the body – for example amputation above the knee or elbow. This term is not defined in the WHS Act; it is used within this document to identify certain circumstances which will trigger additional steps in the enforceable undertaking process.
- > **The regulator** – as defined in the *Work Health and Safety Act 2011*, or his or her delegate.
- > **Access Canberra** – Access Canberra is the agency within which the regulator for the *Work Health and Safety Act 2011* sits, and the agency which administers enforceable undertakings.
- > **WHS Act** – The *Work Health and Safety Act 2011* (ACT)

2. BACKGROUND

In the event of an alleged contravention of the WHS Act, the regulator may, as an alternative to prosecuting the contravention, accept an undertaking given by the person who is alleged to have committed the contravention.

An enforceable undertaking is a high level sanction which is legally binding and is used where the alleged contravention is of a serious nature. Accepted enforceable undertakings will form part of the duty holder’s compliance history. An enforceable undertaking provides an opportunity for organisational reform to implement effective workplace health and safety.

Each proposed undertaking is considered on its merit taking into account matters such as the seriousness of the alleged contravention. An enforceable undertaking should aim to deliver tangible benefits to the workers, industry and the broader community.

3. LEGISLATIVE BASIS

Part 11 of the WHS Act deals with work health and safety undertakings referred to as ‘enforceable undertakings’ or ‘undertakings’ by the regulator. The regulator may accept a written enforceable undertaking. Provision is also made for the enforcement of undertakings through court orders.

An enforceable undertaking may be proposed in a variety of circumstances including where an alleged contravention has been identified by the regulator and the circumstances of the matter may lead to a high level enforcement response such as prosecution. Although an enforceable undertaking can also be proposed after court proceedings have commenced and a summons to appear in court has been issued, this makes consideration by the regulator much more difficult. Any proposal made at this late stage must not interfere with the progress of the matter in court, and persons intending to propose an undertaking should be aware that once the matter is before the court the proceedings are in the hands of the ACT Director of Public Prosecutions.

A person may be advised of the option of proposing an enforceable undertaking but cannot be compelled to propose an enforceable undertaking. Similarly, a person cannot compel the regulator to accept an undertaking. It is up to the person, or the person’s authorised representative, to propose an undertaking for consideration by the regulator.

The proposal of an undertaking does not constitute an admission of guilt in respect of the alleged contravention to which the undertaking relates.

However, an undertaking cannot be accepted for an alleged contravention of a category 1 offence.

A proposed enforceable undertaking will not be considered until the regulator is satisfied, following investigation, that a matter does not relate to a category 1 offence.

3.1. TIMEFRAME FOR PROPOSAL

A person considering an enforceable undertaking must negotiate a timeframe for submission with the regulator.

Investigations and any legal proceedings will continue until such a time as any proposed undertaking is accepted. Early agreement on acceptable timeframes with the regulator is desirable to ensure a timely consideration of the enforceable undertaking.

3.2. WORKERS’ COMPENSATION/CIVIL ACTION

A person intending to make a workers’ compensation claim or who wishes to pursue civil legal remedies is not prevented from doing so because of an enforceable undertaking.

4. FINDING OUT MORE ABOUT ENFORCEABLE UNDERTAKINGS

4.1. PUBLICATIONS

There are several publications that will provide background information to assist in the preparation of enforceable undertaking proposals. These include:

- > Enforceable undertakings – information for auditors
- > Enforceable undertakings – information for injured persons next of kin and guardians
- > Enforceable undertakings – at a glance

These publications are available at www.accesscanberra.act.gov.au or by contacting 13 22 81.

4.2. INTERNET PUBLISHING

General information on enforceable undertakings is available at www.accesscanberra.act.gov.au.

This site also contains information about previous enforceable undertakings accepted by the regulator. Each entry provides a summary of the enforceable undertaking. Generally the entire enforceable undertaking is also available.

4.3. PRE-PROPOSAL ADVISORY SERVICES

Pre-proposal advisory services are available to persons wishing to propose an enforceable undertaking. These services aim to explain the submission process, the factors used when evaluating the proposal and the process adopted after an enforceable undertaking has been considered.

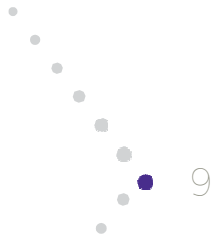
Persons intending to submit a proposal are strongly encouraged to make use of these services prior to making a proposal. Where possible, these services are provided through face-to-face meetings. It is beneficial for the organisation's chief executive officer, or a duly authorised person, and the person within the organisation functionally responsible for work health and safety matters, to participate in these discussions.

This service is aimed at giving sufficient information to allow a person to determine if proposing an enforceable undertaking is the most appropriate path to take, and if taken, the scope of activities likely to be needed within the proposed enforceable undertaking for consideration. The duty holder may also wish to obtain legal advice.

Conversations, advice, etc associated with proposing an enforceable undertaking are conducted on a without prejudice basis. Any assistance provided cannot be seen as a guarantee that the enforceable undertaking will be accepted if the advice is followed.

The service can be accessed by contacting Access Canberra on 13 22 81.

5. DECIDING TO PROPOSE AN UNDERTAKING



There are substantial benefits to a person proposing an enforceable undertaking including improved safety outcomes for the workplace, industry and the community. However, a decision to propose an enforceable undertaking should not be taken lightly, as the activities associated with an enforceable undertaking are substantial, on-going and may be substantially higher than the value of the fine a court may impose for the matter.

Before deciding whether to propose an enforceable undertaking, the best option is to contact Access Canberra for advice. Access Canberra will assist the person to understand what an enforceable undertaking is and the proposal process.

The duty holder may also wish to obtain legal advice.



6. DEVELOPING THE PROPOSAL

An enforceable undertaking comprises of two sections – general information and enforceable terms.

The general information provides the regulator with background information on the person and relevant matters surrounding the alleged contravention. The regulator may verify the information that has been set out in the enforceable undertaking.

Enforceable terms are the commitments made by the person, in connection with the enforceable undertaking. These will be monitored and assessed by the regulator to determine compliance.

Both the general information and enforceable terms form part of the evaluation by the regulator.

6.1. SECTION 1 – GENERAL INFORMATION

An enforceable undertaking must include the following information:

- > details of the person proposing the enforceable undertaking
- > details of the alleged contravention
- > details of the events surrounding the alleged contravention, e.g. incident details
- > an acknowledgement that the regulator has alleged a contravention has occurred
- > details of any injury that arose from the alleged contravention
- > details of any notices issued that relate to the alleged contravention
- > a statement of assurance about future work health and safety behaviour
- > when an alleged contravention is associated with an injury/illness:
 - the details of the type of workers compensation provided (if the injured person is a worker of the person)
 - details of the support provided, and proposed to be provided, to the injured person to overcome the injury/illness
- > details of any existing occupational health and safety management systems at the workplace including the level of auditing currently undertaken
- > details of any consultation undertaken within the workplace regarding the proposal of an enforceable undertaking
- > a statement of regret that the incident occurred i.e. not an admission of guilt – refer section 216(3) of the WHS Act
- > any rectifications made as a result of the alleged contravention
- > an acknowledgement that the enforceable undertaking may be published and publicised
- > a statement of ability to comply with the terms of the enforceable 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 to the beneficiary



> a statement granting the regulator a licence to use the person’s intellectual property developed as part of the enforceable undertaking.

The person may be required to provide a statutory declaration outlining details of any prior work health and safety convictions, findings of guilt or enforceable undertakings under work health and safety legislation or any work health and safety related legislation. This information will not be published in the undertaking but will be used as part of the enforceable undertaking evaluation process.

6.2. SECTION 2 – ENFORCEABLE TERMS

The enforceable undertaking must set out the following terms, which the person will be accountable for completing. Where possible all terms are to have a nominated cost to deliver the term and a nominated period, following the acceptance of the enforceable undertaking, by which the term will be met.

- > 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 work health and safety risks.
- > A commitment to disseminate information about the enforceable undertaking to workers, and other relevant parties (which may include work health and safety representatives), and in the annual report (if applicable).
- > A commitment to participate constructively in all compliance monitoring activities of the enforceable undertaking.
- > Strategies that will deliver worker work health and safety benefits.
- > Strategies that will deliver industry work health and safety benefits.
- > Strategies that will deliver community benefits. Proposed initiatives must focus on delivering work health and safety outcomes within the community rather than merely being a general financial donation that can be used as the recipient determines.
- > A commitment that any promotion of a benefit arising from the enforceable undertaking will clearly link the benefit to the undertaking and that the undertaking was entered into as a result of an alleged contravention.
- > Where the regulator considers appropriate in the circumstances:
 - A commitment to establish and maintain (or maintain if a system already exists) an WHSMS, acceptable to the regulator, that meets the principles of AS/NZS 4804: 2001 *Occupational health and safety management systems – general guidelines on principles, systems and supporting techniques*
 - A commitment to ensure the WHSMS is audited by third party auditors that meet the principles of AS/NZS 4801: 2001 *Occupational health and safety management systems – specification* with guidance for use as set by the regulator
- > A commitment to provide a copy of each finalised WHSMS audit report to the regulator along with a letter certifying that the report has not been altered from the copy provided by the WHSMS auditor.
- > A commitment to implement the recommendations from these audits (unless otherwise negotiated with the regulator).

6.3. UNACCEPTABLE INCLUSIONS

An enforceable undertaking must not include:

- > a denial of liability (it also need not include an admission of liability)
- > any terms which may set up defences for possible non-compliance with the enforceable undertaking
- > any terms which may set up defences for possible future contraventions of the WHS Act
- > any terms that may impose an obligation on the regulator or any other person without the person's consent.

6.4. UNDESIRABLE INCLUSIONS

An enforceable undertaking should not include:

- > proposals for improvements to the workplace which should have been completed in the normal course of compliance with the duties under the WHS Act, particularly those compliance activities which would have prevented the potential breach in question, For example, guarding for machinery which was not present or insufficient prior to an incident.
- > proposals for expenses to be incurred by the person in the normal course of business operations. For example, additional staff not allocated specifically to safety roles.
- > other commitments which do not have a clear safety benefit.

6.5. POSSIBLE STRATEGIES

Strategies included in an enforceable undertaking must extend beyond compliance with the legislation.

Enforceable undertakings allow more flexible and broad outcomes than those available through prosecution in the courts. The outcomes may include, but are not limited to, a combination of the following:

- > conducting, facilitating or funding research into a safety issue relevant to the industry
- > implementation of specified projects, such as special training programs
- > to address particular needs of workers, supervisors and management
- > promotion and education campaigns targeted to various sectors
- > targeted publicity regarding the alleged contravention
- > employing and/or funding work health and safety expertise within the workplace and/or industry sector
- > community service commitments, such as implementation of an industry-wide awareness program or publication of material dealing with the enforceable undertaking in relevant trade journals or newspapers
- > assisting in, or funding, the development of industry standards relevant to the person's industry
- > funding tertiary scholarships for work health and safety students in consultation with relevant universities.

7. SUBMITTING A PROPOSAL

7.1. TIMEFRAMES

A person considering an enforceable undertaking must negotiate a timeframe for submission with the regulator.

Investigations and any legal proceedings will continue until such time as any proposed enforceable undertaking is accepted. Early agreement on acceptable timeframes with the regulator is desirable to ensure a timely consideration of the enforceable undertaking.

7.2. SETTING OUT THE ENFORCEABLE UNDERTAKING

An enforceable undertaking should be submitted in the format of the enforceable undertakings proposal template. An electronic version of the template can be obtained by contacting Access Canberra.

Signatories to an enforceable undertaking should note that the submission of a proposed enforceable undertaking does not guarantee acceptance as each enforceable undertaking is considered on merit and the circumstances of the alleged contravention.

7.3. CONTENTS OF THE ENFORCEABLE UNDERTAKING

A proposed enforceable undertaking must incorporate particular information and a number of terms that support the assurance of future behaviour.

Note that section 268 of the WHS Act refers to provisions of the *Criminal Code 2002* under which it is an offence to give false or misleading information.

7.3.1. SECTION 1—GENERAL INFORMATION

Following are instructions about the information required in the proposed enforceable undertaking.

a. Details of the person proposing the enforceable undertaking

This section must include the following background information about the person:

- > contact details
- > the type of legal structure (e.g. whether the person is a natural person, government agency, sole trader, a partnership or body corporate)
- > the type of business conducted (e.g. construction or engineering)
- > commencement date of the entity
- > number of full and part time workers
- > description of the person's products and services.

b. Details of the alleged contravention

Outline the details of the alleged contravention e.g. if you have received advice from the regulator that it alleges you have contravened a requirement under the WHS Act, this information can be found on these documents.

c. Details of the events surrounding the alleged contravention

Include one to two paragraphs that describe the factual details of the incident or alleged breach of work health safety legislation. Do not include individuals' names or gender; instead use suitable terms that best describe the person's relationship to the incident such as the injured worker, a member of the public, or the site or workshop supervisor. Avoid including opinion on how the incident occurred.

d. An acknowledgment that the regulator has alleged a contravention has occurred.

The enforceable undertaking must acknowledge that the regulator alleges a contravention has occurred. A suitable acknowledgement might read something like 'It is acknowledged that the regulator has alleged [the entity or the person] has contravened provisions of the Work Health and Safety Act 2011'.

e. The details of any injury or risk of injury that arose from the alleged contravention

Specify what injuries occurred as a result of the alleged contravention.

f. The details of any notices issued that relate to the alleged contravention

Include details of any notices issued in relation to the alleged contravention and the actions taken in response to these notices.

g. A statement of assurance about future work health and safety behaviour

Make a statement that gives an assurance about future health and safety behaviour. The terms of the enforceable undertaking will provide a further illustration of this assurance.

When an alleged contravention is associated with an injury/illness:

h. The details of the type of workers compensation provided (if the injured person(s) is a worker of the person)

The enforceable undertaking must identify the type of workers' compensation provided to any injured persons associated with the alleged contravention.

i. The details of the support provided, and proposed to be provided, to any injured person(s) to overcome the injury/illness

The enforceable undertaking must include the employment status of any injured person(s) associated with the alleged contravention – whether the person is a worker, subcontractor or visitor to the workplace.

The enforceable undertaking must also detail the support provided, and proposed to be provided, to any injured person(s) to assist his/her quality of life following the incident (such as assistance with rehabilitation programs, retraining or re-employment) or adjustments at the injured person's home.

j. If the matter involves a very serious injury, a claim to demonstrate that exceptional circumstances exist that the enforceable undertaking is more appropriate than pursuing prosecution

The enforceable undertaking must identify whether the alleged contravention involves a very serious injury. If it does, the proposal must be supported by a claim that demonstrates exceptional circumstances exist for the enforceable undertaking to be considered despite the injury outcomes. This should be discussed with the regulator prior to the giving of a written enforceable undertaking.

Note: Enforceable undertakings cannot be considered for category 1 offences.

k. The details of any existing WHSMS at the workplace including the level of auditing currently undertaken

The enforceable undertaking must include details about the WHSMS in place at the workplace, if any, including how often and what type of WHSMS auditing is conducted.

l. Details of any consultation undertaken within the workplace regarding the proposal of an enforceable undertaking

The enforceable undertaking must include details about any consultation that has been undertaken within the duty-holder's workplace(s) regarding the proposing of an enforceable undertaking, including consultation with the health and safety representative of the relevant workgroup.

m. A statement of regret that the incident occurred

Include a statement indicating that the person sincerely regrets that the alleged contravention occurred. This does not need to be expressed as an admission of guilt (refer to section 216(3) of the WHS Act).

n. Any rectifications made as a result of the contravention

Detail the improvements that have been made to date within the workplace to rectify the situation that led to the alleged contravention. This may include the elimination of the hazards that led to the alleged contravention or the use of specific control measures to minimise risk where the hazard could not be eliminated.

Details of the costs of the rectifications must also be included.

Note: The regulator may seek to confirm any claims made in relation to rectifications. Section 268 of the WHS Act refers to provisions of the *Criminal Code 2002* under which it is an offence to give false or misleading information

o. An acknowledgement that the enforceable undertaking may be published and publicised

The enforceable undertaking must acknowledge that the undertaking may be published on Access Canberra’s internet site and may be referenced in Access Canberra’s publications.

The enforceable undertaking must also acknowledge that a public notice of the undertaking may generally be submitted to newspapers and other media as determined by the regulator.

The regulator must publish its decision to accept the undertaking, and generally will publish and publicise the undertaking itself.

p. Statement of ability to comply with the terms of the enforceable undertaking

The person must acknowledge an ability to meet the financial and other terms of the enforceable undertaking.

Note: The regulator may require evidence to this effect, such as a statement from the person’s accountant or financial auditor or agreement from a third party to publish a document in a journal.

q. Intellectual property licence

The person must grant the regulator a permanent, irrevocable, royalty free, worldwide, non- exclusive licence to use, reproduce, publish, distribute, electronically transmit, electronically distribute, adapt and modify any materials developed as a result of the enforceable undertaking.

r. Statutory declaration

The regulator may require a statutory declaration outlining details of any prior work health and safety convictions, findings of guilt or enforceable undertakings under any work health and safety legislation or work health and safety related legislation.

Note: This information will not be published in the enforceable undertaking but will be used as part of the enforceable undertaking evaluation process.

s. Acknowledgment of overview and guidelines

The enforceable undertaking must include an acknowledgment that these guidelines for proposing an enforceable undertaking have been read and understood and note the version number of the documents.

732 SECTION 2 – ENFORCEABLE TERMS

a. A commitment that the behaviour that led to the alleged contravention has ceased and will not reoccur

In the enforceable undertaking the person must make a statement that illustrates a commitment that the behaviour that led to the alleged contravention has ceased and will not recommence.

b. A commitment to the ongoing effective management of work health and safety risks

In the enforceable undertaking the person must include a commitment to the ongoing management of work health and safety risks and describe the strategies that will be employed to satisfy the person’s senior leadership (including officers as defined in the Dictionary to the WHS Act) that this commitment is being met.

c. *A commitment to disseminate information about the enforceable undertaking to workers, and other relevant parties (which may include work health and safety representatives), and in the annual report (if applicable)*

In the enforceable undertaking the person must agree to disseminate information about the undertaking within the workplace, including to the members of any health and safety committee, health and safety representatives, workers and other relevant parties. The person must state how the dissemination will occur and the timeframes for implementation.

In addition, if the person is a body corporate, a commitment must be given to publish details of the enforceable undertaking in the body corporate's first annual report due after the date the undertaking is accepted. Likewise, the crown and public authorities must provide a commitment to publish details of the enforceable undertaking in the first annual report due after the date the undertaking is accepted.

d. *A commitment to participate constructively in all compliance monitoring activities of the enforceable undertaking*

In the enforceable undertaking the person must acknowledge responsibility for demonstrating compliance with the undertaking and that compliance monitoring will be conducted by Access Canberra to ensure compliance with the undertaking.

The acknowledgement must recognise that:

- > the person will provide to the regulator, by the due date for a term, evidence to demonstrate compliance with the term
- > cooperation will be provided to the regulator in the event that the regulator chooses to undertake other compliance monitoring activities (such as a site visit) to verify the evidence provided
- > material offered as evidence of compliance will be retained by the person throughout the period of the enforceable undertaking and provided to the regulator on request.

Note: the regulator may undertake or arrange compliance monitoring activities between terms being due and a final inspection may be conducted once all aspects of the enforceable undertaking have been implemented and are complete.

e. *Strategies that will deliver work health and safety worker benefits¹*

In the enforceable undertaking the person must include details of the tangible health and safety initiatives that will be delivered to benefit workers. Details must include the timeframes for implementation and estimated costs.

f. *Strategies that will deliver work health and safety industry benefits¹*

In the enforceable undertaking the person must include details of initiatives that will be applied to benefit the relevant industry, with timeframes for implementation and estimated costs.

g. *Strategies that will deliver community benefits¹*

In the enforceable undertaking the person must include details of initiatives that will be implemented to benefit the community, with timeframes for implementation and estimated costs. These benefits must relate to workplace health and safety outcomes.

¹ The strategies proposed may demonstrate benefits across e, f and g. However the benefits in each area must be specified.

h. Linking promotion of benefits to the enforceable undertaking

The enforceable undertaking must include a commitment that any promotion of a benefit arising from the undertaking will clearly link the benefit to the undertaking and that the undertaking was entered into as a result of an alleged contravention.

Where the regulator considers appropriate in the circumstances:

Contact the regulator to discuss whether the following are required:

i. A commitment to establish and maintain (or maintain if a system already exists) an WHSMS

Where there is no formal documented WHSMS in place, in the enforceable undertaking the person must outline that a system acceptable to the regulator that satisfies the principles of AS/NZS 4804: 2001 Occupational health and safety management systems – General guidelines on principles, systems and supporting techniques will be implemented within a specified timeframe from the date of signing of the enforceable undertaking.

Where there is an WHSMS in place, the person must commit to ensuring the WHSMS complies with the principles of AS/NZS 4804: 2001 Occupational health and safety management systems – General guidelines on principles, systems and supporting techniques or commitment to ensuring compliance within an agreed timeframe from the date of signing the enforceable undertaking.

The person must also acknowledge that the WHSMS will be maintained in accordance with the standard.

j. A commitment to ensure the WHSMS is audited by third party auditors

In the enforceable undertaking the person must commit to ensuring the WHSMS will be audited by accredited third party auditors that meet the principles of AS/NZS 4801: 2001 Occupational Health and Safety Management Systems – Specification with guidance for use, as set by the regulator in accordance with established timeframes.

Note: The costs associated with these audits will be met by the person proposing the enforceable undertaking.

The person must acknowledge that the auditors selected to perform WHSMS audits must meet the qualification requirements as set by the regulator.

The enforceable undertaking must acknowledge that details of the auditors' qualifications against the stated requirements will be provided with audit reports submitted to the regulator.

The person must commit to providing a copy of the *Enforceable undertakings – information for auditors* fact sheet to the auditor.

For persons that already have an acceptable WHSMS in place the person must acknowledge that:

- > an initial third party audit will be undertaken within a timeframe agreed between the regulator and the person
- > at least two further third party audits will be undertaken during the course of the undertaking.

For persons that do not already have an acceptable WHSMS in place, the person must acknowledge that:

- > an initial third party audit will be undertaken within a timeframe agreed between the regulator and the person, following implementation of the WHSMS
- > at least two further third party audits will be undertaken during the course of the undertaking.

k. A commitment to provide a copy of each finalised WHSMS audit report to the regulator.

In the enforceable undertaking the person must commit to:

- > within an agreed timeframe from receipt of the finalised WHSMS audit report, for each WHSMS audit from the WHSMS auditor, providing a copy of the report to the regulator along with a letter certifying that the report has not been altered from the copy provided by the auditor
- > providing the regulator with information on how the person intends to address each of the report's recommendations. This information is to be forwarded within an agreed timeframe from receipt of the written report from the auditor, accompanied by any requests for exemption or consideration of alteration to the recommendations or timeframes
- > reports arising from the WHSMS audits will be delivered to:

**The Regulator
Re: WHS Undertakings
Access Canberra
GPO Box 158
Canberra ACT 2601**

l. A commitment to implement the recommendations from these audits (unless otherwise negotiated with Access Canberra)

In the enforceable undertaking the person must commit to fully implementing the intended actions arising from the audit within a specified timeframe from receiving the audit report from the WHSMS auditor unless otherwise agreed by Access Canberra.

7.4. FINALISING THE PROPOSAL

An enforceable undertaking proposal should be submitted in the format of the enforceable undertakings proposal template. An electronic version of the template can be obtained by contacting Access Canberra. Before submitting the proposed undertaking:

- > ensure that all personal names and references to particular gender are omitted, and terms such as ‘manager’, ‘supervisor’, ‘worker’, ‘injured person’ are used instead
- > include the version number, date and page number on each page – a proposed enforceable undertaking may be resubmitted throughout the evaluation process following feedback from Access Canberra. Therefore, it is necessary for proposed enforceable undertakings to have version control
- > ensure the proposed enforceable undertaking has been signed by the person, or by a duly authorised person.

By signing the enforceable undertaking, the person agrees to comply with the terms of the undertaking if the undertaking is accepted by Access Canberra.

- > ensure that a copy of these guidelines with check boxes completed is included with the proposed enforceable undertaking
- > submit the enforceable undertaking to:

The Regulator
Re: WHS Undertakings
Access Canberra
GPO Box 158
Canberra ACT 2601

Once received, an officer will be in contact to discuss the enforceable undertaking and seek clarification as necessary. All responsibility for the content of the enforceable undertaking rests solely with the person giving the undertaking.

An enforceable undertaking becomes enforceable when accepted by the regulator. If an enforceable undertaking is not accepted, the person (see definitions) will be advised of the reason, and legal proceedings may be instituted, or, where adjourned, reinstated.

8. EVALUATION OF THE PROPOSAL

The proposed undertaking will be evaluated with regard to:

- > the proposed undertaking's merits and benefits
- > the person's financial ability to meet the terms of the proposed enforceable undertaking
- > the significance of the commitment compared to the capability of the person
- > the person's compliance history
- > the person's safety culture
- > the person's level of cooperation during the investigation into the alleged breach of work health and safety legislation
- > actions which have been taken by the person to identify and address any weaknesses in safety systems since the incident or allegation occurred.
- > the support the person has provided, and has committed to provide into the future to the injured person(s) or their dependants
- > the input from injured persons, next of kin or guardians (as relevant)
- > the likely outcome should the matter to be dealt with through legal proceedings.

The evaluation will rely upon the information provided in the proposed enforceable undertaking and any relevant information held by the regulator. The information supplied by the person may be subject to verification by the regulator.

8.1. MERITS AND BENEFITS OF THE UNDERTAKING

In addition to determining whether the terms outlined in section 5 are addressed appropriately, the merits and benefits of the proposed enforceable undertaking will be assessed having regard to:

- > the nature and extent of the act or omission giving rise to the alleged contravention
- > the quality of the strategies proposed and the extent to which they are likely to achieve measurable improvements in work health and safety
- > the degree to which the enforceable undertaking delivers benefits beyond compliance with the law.

8.2. INPUT FROM INJURED PERSON(S), NEXT OF KIN OR GUARDIAN (AS RELEVANT)

The evaluation process allows for consideration of information from injured person(s), or guardians (as relevant) associated with the proposed enforceable undertaking. The information sought from the injured person(s) can include:

- > the incident
- > the injured person's general views on safety management at the workplace – apart from safety issues relating to the incident
- > details of his/her current employment status
- > details of his/her likely future work capacity

- > details of the injured person’s recovery from the injury
- > information regarding the rehabilitation program(s) the injured person has been involved in
- > information regarding any assistance the person proposing the enforceable undertaking has provided to improve the injured person’s quality of life since the incident
- > the injured person’s views on whether an enforceable undertaking would be an acceptable alternative to the matter being addressed through legal proceedings.

Note: The injured person is not provided a copy of the proposed enforceable undertaking but does receive a copy of the undertaking if it is accepted by the regulator.

Note: Agreement to or endorsement of an enforceable undertaking by an injured person, next of kin or guardian(s) is not a mandatory condition for acceptance of a proposal by the regulator. The views of the injured person or guardian(s) will nonetheless be considered by the regulator in its evaluation of a proposed enforceable undertaking.

8.3. DECISION TO ACCEPT/REJECT PROPOSAL

An enforceable undertaking becomes enforceable when accepted by the regulator. If an enforceable undertaking is not accepted, the person proposing the undertaking will be advised of the reason, and legal proceedings may be instituted or, where adjourned, these may be reinstated.

The decision by the regulator to refuse to accept an undertaking may be reviewable in the Supreme Court under the *Administrative Decisions (Judicial Review) Act 1989*.

The decision to accept or reject an undertaking will be advised in writing to the person along with reasons for the decision.

8.4. REQUEST TO VARY OR WITHDRAW AN UNDERTAKING

Prior to the regulator accepting an enforceable undertaking, the person can withdraw or vary the proposed undertaking. Once an enforceable undertaking has been accepted it can only be withdrawn or varied with the written agreement of the regulator. However, the provisions of an enforceable undertaking cannot be varied to provide for a different alleged contravention.

9. COMMUNICATION ABOUT **ENFORCEABLE UNDERTAKINGS**

9.1. PUBLICISING ENFORCEABLE UNDERTAKINGS

Publicising enforcement outcomes assists in fostering a culture of compliance.

A notice of decision to accept (and the reasons for accepting), vary or withdraw an enforceable undertaking will be published on Access Canberra’s website. A notice of the acceptance of an enforceable undertaking, along with a summary of the terms of the undertaking may generally be published in a newspaper within the Territory that would likely have a readership that would relate to the undertaking.

In general, all enforceable undertakings that have been accepted are published on Access Canberra’s website. The regulator will blank out text where necessary to ensure compliance with privacy legislation and meet agreed commercial-in-confidence aspects.

9.2. PROMOTION OF THE ENFORCEABLE UNDERTAKING

In addition to disseminating the terms of the enforceable undertaking through the workplace after acceptance, a person may seek to promote, individually or with the regulator, the benefits obtained through an enforceable undertaking. Where a person seeks to promote the benefits it must be made clear that any such benefits arose as a result of an enforceable undertaking with the regulator as a result of an alleged contravention of the work health and safety legislation. The promotion could be through joint presentations to industry peers or media press releases.

10. COMPLIANCE MONITORING

The date of acceptance of the enforceable undertaking by the regulator designates the start date for monitoring and reporting purposes. Results of compliance monitoring will be communicated to the person.

The person's compliance with the terms of the enforceable undertaking will be monitored by the regulator to ensure that all commitments given in the undertaking have been implemented. The regulator will undertake activities confirming:

- > all terms are being implemented, or complied with, as set out in the enforceable undertaking, and in accordance with relevant timeframes
- > that any required WHSMS audits have been conducted
- > actions arising from the WHSMS audits have been submitted and implemented.

Material, documents etc, offered as evidence of compliance must be retained by the person throughout the period of the enforceable undertaking and made available to the regulator on request.

10.1. OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT SYSTEM RELATED TERMS

As the WHSMS audits are conducted by auditors engaged by the person, monitoring by the regulator for WHSMS-related terms will confirm that:

- > there is a WHSMS in place
- > audits are being conducted by suitably accredited auditors
- > audit recommendations are being implemented appropriately in accordance with enforceable undertaking timeframes.

The fact sheet entitled *Enforceable undertakings – information for auditors* outlines the requirements for auditors and audit reports.

10.2. NON-OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT SYSTEM RELATED TERMS

It is the signatory's responsibility to satisfy the regulator that the terms of the undertaking are being complied with in accordance with the enforceable undertaking.

The regulator will assess the evidence provided to determine whether compliance has been achieved.

Depending on the term, the regulator may also initiate verification activities to collect evidence to satisfy itself of compliance.



11. FAILURE TO COMPLY WITH AN ENFORCEABLE UNDERTAKING

It is an offence to contravene an enforceable undertaking. The maximum penalty for failure to comply is:

- > \$50,000 for an individual
- > \$250,000 for a body corporate.

In addition to the imposition of any penalty, a court may make one or both of the following orders:

- > direct the person to comply with the enforceable undertaking, or
- > discharge the enforceable undertaking.

The court may also make any other orders it deems appropriate in the circumstances, including orders directing the person to pay to the state:

- > the costs of the proceedings
- > the reasonable costs of the regulator in monitoring compliance with the enforceable undertaking in the future.

In addition to the above penalties for failing to comply with an enforceable undertaking, the regulator may also, within a specified timeframe, commence court proceedings for the original alleged contravention to which the enforceable undertaking relates.

12. DURATION OF THE ENFORCEABLE UNDERTAKING

The duration of an enforceable undertaking is determined by the content of the agreed terms. An enforceable undertaking commences and is enforceable once accepted by the regulator.

An enforceable undertaking will be concluded on written advice from the regulator when all requirements of the undertaking have been satisfactorily executed.



13. EFFECT OF THIRD PARTY REQUEST FOR PROSECUTION

Under the WHS Act if any person reasonably considers that a category 1 or category 2 offence has occurred and the regulator has not commenced prosecution action after six months, the person may, within 12 months, write to the regulator to request a prosecution be commenced.

The regulator must consider this request and advise both the person making the request and the person subject to the allegation, of the regulator’s decision regarding the commencement of a prosecution. The regulator is not obligated to commence a prosecution.

If the person making the request disagrees with the regulator’s decision, he/she may ask the regulator to refer the matter to the Director of Public Prosecutions (DPP) for consideration.

The DPP will consider the matter and advise the regulator whether the DPP considers a prosecution should be brought. The regulator is required to provide the person with the DPP’s advice. The DPP’s advice is not binding on the regulator to commence a prosecution. If the regulator declines to follow the advice of the DPP to bring proceedings the regulator must give written reasons for the decision to the person.

To allow any request to be properly considered, where an application for an enforceable undertaking has been received, the enforceable undertaking application will be placed on hold while the prosecution request is considered.

14. WHO TO CONTACT

Further information about proposing an enforceable undertaking can be obtained by contacting: Email: worksafe@act.gov.au

Telephone: 13 22 81