



WHS undertakings: AN OVERVIEW

WorkSafe Tasmania
Department of Justice



This information is for guidance only and is not to be taken as an expression of the law. It should be read in conjunction with the *Work Health and Safety Act 2012*, the *Work Health and Safety Regulations 2012* and any other relevant legislation. To view, go to www.legislation.tas.gov.au.

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I Introduction

This document provides an overview of work health and safety (WHS) undertakings under the *Work Health and Safety Act 2012*. If you are intending to propose an undertaking, also read the publication *WHS undertakings: Guidelines for proposing a WHS undertaking*. Find this on the Worksafe Tasmania website under the Resources tab (www.worksafe.tas.gov.au/resources).

I.1 Definitions

A WHS undertaking: A written undertaking proposed by a person in connection with a matter relating to an alleged contravention by the person of the *Work Health and Safety Act 2012*. Once accepted by the regulator, the undertaking becomes enforceable. It is also known as an enforceable undertaking.

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.

Term of an undertaking: Something for which the person can be held accountable if the WHS 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 and a public authority as well as an individual.

The regulator: The person appointed as the regulator in accordance with Schedule 2, Part 1 of the *Work Health and Safety Act 2012*.

WHSMS: Work health and safety management system.

WorkSafe Tasmania: The agency responsible for administering the *Work Health and Safety Act 2012*.

2 Background

In the event of an alleged contravention of the *Work Health and Safety Act 2012*, the regulator may, as an alternative to prosecuting the contravention, accept a work health and safety (WHS) undertaking given by the person who is alleged to have committed the contravention.

A WHS undertaking (also known as 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 undertakings will form part of the duty holder's compliance history. An undertaking provides an opportunity for organisational reform to improve WHS practices.

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

A flowchart of the steps involved in an undertaking is provided in Appendix 1.

3 Legislative basis

Part 11 of the *Work Health and Safety Act 2012* deals with WHS undertakings. The regulator may accept a written undertaking. Provision is also made for the enforcement of WHS undertakings through court orders.

A WHS 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. A WHS undertaking can also be proposed after a complaint has been laid and a summons to appear in court has been issued.

A person may be advised of the option of proposing a WHS undertaking but cannot be compelled to propose an 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 the regulator to consider.

The proposal of a WHS undertaking does not constitute an admission of guilt for the alleged contravention to which the undertaking relates.

A WHS undertaking cannot be accepted for an alleged contravention of a Category 1 offence. A proposed 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 proposing a WHS undertaking should negotiate with the regulator a timeframe for submitting a proposed undertaking. Upon receiving a proposal, if legal proceedings have been commenced, they may be adjourned until a decision to accept or reject the WHS undertaking has been made. If legal proceedings have been adjourned and the regulator accepts the WHS undertaking, the proceedings will be discontinued.

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 a WHS undertaking.

4 Deciding to propose a WHS undertaking

There are substantial benefits to a person proposing a WHS undertaking, including improved safety outcomes for workers, industry and the community. However, a decision to propose a WHS undertaking should not be taken lightly, as the activities associated with an undertaking are substantial, ongoing, and may be several times the value of the fine a court may impose for the matter.

Before deciding whether to propose a WHS undertaking, the best option is to contact the regulator for advice. The regulator will help the person understand what an undertaking is and the proposal process. The person may also wish to obtain independent legal advice.

5 Developing the proposal

A WHS undertaking comprises 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 WHS undertaking
- enforceable terms are the commitments made by the person in connection with the WHS undertaking. These will be monitored and assessed by the regulator to determine compliance with the undertaking.

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

5.1 Section 1: General information

A WHS undertaking must include:

- details of the person proposing the undertaking
- details of the alleged contravention
- details of the events surrounding the alleged contravention; for example, incident details
- an acknowledgement that the regulator has alleged a contravention has occurred
- details of all injuries, if any, that arose from the alleged contravention
- details of all notices, if any, issued that relate to the alleged contravention
- details of the type of workers compensation or other insurance benefit provided
- details of the support provided, and proposed to be provided, to the injured person, their family or others
- details of any existing work health and safety management systems currently implemented and maintained, including the level of auditing undertaken
- details of any consultation undertaken within the workplace about the proposal of a WHS undertaking
- a statement of regret that the incident occurred (that is, not an admission of guilt; refer to section 216(3) of the *Work Health and Safety Act 2012*)
- any rectifications made as a result of the alleged contravention
- an acknowledgement that the WHS undertaking may be published and publicised
- a statement of ability to comply with the terms of the WHS undertaking
- a statement regarding the person's relationship with any proposed beneficiary or other recipient of financial benefit
- a statement granting the regulator a licence to use the person's intellectual property developed as part of the WHS undertaking
- an acknowledgement of the guidelines published by the regulator for the acceptance of a WHS undertaking.

The person may be required to provide a statutory declaration outlining details of any prior WHS convictions¹ or findings of guilt under WHS legislation or any WHS-related legislation. This information will not be published in the WHS undertaking, but will be used as part of the undertaking evaluation process.

5.2 Section 2: Enforceable terms

The WHS undertaking must set out the below 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 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 WHS risks.
- A commitment to disseminate information about the undertaking to workers and other relevant parties (which may include WHS representatives), and in the annual report (if applicable).
- A commitment to participate constructively in all compliance monitoring activities of the WHS undertaking.
- Strategies that will deliver worker benefits.
- Strategies that will deliver industry benefits.
- Strategies that will deliver community benefits. Proposed initiatives must focus on delivering WHS outcomes within the community rather than merely being a general financial donation that can be used as the recipient determines.
- Where the regulator considers it appropriate, agreement to pay the regulator's costs.
- A commitment that any promotion of a benefit arising from the WHS undertaking will clearly link the benefit to the undertaking and that the undertaking was entered into as a result of an alleged contravention.
- A commitment to establish or maintain a Work Health and Safety Management System, to ensure it is audited by third part auditors, and to provide a copy of each finalised audit report to the regulator.
- A commitment to implement the recommendations from third party audits.
- A commitment in relation to the minimum spend for the WHS undertaking.

¹ Subject to any local legal constraints such as spent conviction legislation.

5.3 Unacceptable inclusions

A WHS 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 WHS undertaking
- any terms which may set up defences for possible future contraventions of the *Work Health and Safety Act 2012*
- any terms that may impose an obligation on the regulator or any other person without their consent.

5.4 Possible strategies

Strategies included in a WHS undertaking must extend beyond compliance with the legislation.

WHS 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:

- conducting, facilitating or funding research into a safety issue relevant to the industry
- implementing specified projects, such as special training programs to address particular needs for workers, supervisors and management
- implementing promotion and education campaigns targeted to various sectors
- conducting targeted publicity about the alleged contravention
- employing and/or funding WHS expertise within the workplace and/or industry sector
- making community service commitments, such as implementing an industry-wide awareness program, or publishing material dealing with the undertaking in relevant trade journals or newspapers
- donating funds to a not-for-profit organisation with a specific focus on WHS including short, medium and long-term objectives
- assisting in or funding the development of industry standards relevant to the person's industry
- funding tertiary scholarships for WHS students in consultation with relevant education providers.

6 Evaluating the proposal

The proposed undertaking will be evaluated on:

- the objective gravity of the alleged contravention and the nature of the applicant's alleged misconduct
- the merits and benefits of the proposed undertaking
- the person's financial ability to meet the terms of the proposed undertaking
- the significance of the commitment compared to the capability of the person
- the person's past performance and history of compliance with the *Work Health and Safety Act 2012*
- the support the person has provided, and has committed to provide into the future, to the injured persons or their dependants
- input from injured persons, next of kin or guardians (as relevant)
- the likely outcome should the matter be dealt with through legal proceedings
- any other matter which the regulator considers relevant.

The evaluation will rely upon the information provided in the proposed undertaking. This information may be subject to verification by the regulator.

6.1 Merits and benefits of the WHS undertaking

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

- 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 WHS
- the degree to which the WHS undertaking delivers benefits beyond compliance with the law.

6.2 Input from injured persons, next of kin or guardians (as relevant)

The evaluation process allows for information from injured persons, next of kin, or guardians (as relevant) associated with the proposed WHS undertaking to be considered. The information sought from the injured persons can include:

- information about the incident
- their general views on safety management at the workplace (apart from safety issues relating to the incident)
- the injured person's current employment status
- the injured person's likely future work capacity
- the injured person's recovery from the injury
- information about the rehabilitation programs the injured person has been involved in
- information about any assistance the person proposing the WHS undertaking has provided to improve the injured person's quality of life since the incident
- their views on whether a WHS 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 undertaking, but does receive a copy of the undertaking if it is accepted by the regulator.

The injured worker's views are recorded as part of the evaluation of the WHS undertaking.

6.3 Decision to accept/reject proposal

A WHS undertaking becomes enforceable when it is accepted by the regulator. If a WHS undertaking is not accepted, the person proposing the undertaking will be advised of the reason and legal proceedings may be instituted or, where discontinued, may be reinstated.

6.4 Request to vary or withdraw the undertaking

Before the regulator accepts a WHS undertaking, the person can withdraw or vary the proposed undertaking.

Once a WHS undertaking has been accepted, it can only be withdrawn or varied with the written agreement of the regulator.

The provisions of a WHS undertaking that has been accepted cannot be varied to provide for a different alleged contravention.

7 Communication about WHS undertakings

7.1 Publicising the WHS undertaking

Publicising enforcement outcomes helps foster a culture of compliance.

A notice of decision to accept (and the reasons for accepting), vary or withdraw a WHS undertaking will be published on WorkSafe Tasmania's website.

The regulator will generally require the person to publish a notice of the acceptance of a WHS undertaking, along with a summary of the terms of the undertaking, in newspapers in Tasmania that would likely have a readership that would relate to the undertaking.

In general, all WHS undertakings that have been accepted are published in full and in summary on WorkSafe Tasmania's website. The regulator will blank out text where necessary to ensure compliance with privacy legislation and meet agreed commercial-in-confidence aspects.

7.2 Promotion of the WHS undertaking

In addition to disseminating the terms of the WHS undertaking through the workplace after acceptance, a person may seek to promote, individually or with the regulator, the benefits obtained through a WHS undertaking.

Where a person seeks to promote the benefits, it must be made clear that any such benefits arose as a result of a WHS undertaking accepted by the regulator, as a result of an alleged contravention of the legislation.

The promotion could be through joint presentations to industry peers or media press releases.

8 Compliance monitoring

The date of acceptance of the WHS undertaking by the regulator designates the start date for monitoring and reporting purposes.

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

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

Material and documents offered as evidence of compliance must be retained by the person throughout the period of the WHS undertaking.

Results of compliance monitoring will be communicated to the person.

8.1 WHSMS related terms

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

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

See WHS undertakings: Information for auditors for the requirements for auditors and audit reports. Find this at www.worksafe.tas.gov.au under the Resources tab.

8.2 Non-WHSMS related terms

It is the responsibility of the person entering into the WHS undertaking to satisfy the regulator that the terms of the WHS undertaking are being complied with in accordance with the undertaking. The regulator will assess the evidence provided to determine whether compliance has been achieved. Depending on the terms, the regulator may also initiate verification activities to collect evidence to satisfy itself of compliance.

9 Failure to comply with a WHS undertaking

It is an offence to contravene a WHS 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 either of the following orders:

- direct the person to comply with the WHS undertaking; or
- discharge the WHS 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 WHS undertaking in the future.

In addition to the above penalties for failing to comply with a WHS undertaking, the regulator may also, within 6 months, start court proceedings for the original alleged contravention to which the WHS undertaking relates.

10 Duration of a WHS undertaking

The duration of a WHS undertaking is determined by the content of the agreed terms.

A WHS undertaking starts and is enforceable once accepted by the regulator.

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

11 Effect of a third party request for prosecution

Under the *Work Health and Safety Act 2012*, if any person reasonably considers that a Category 1 or Category 2 offence has occurred and the regulator has not commenced prosecution action after 6 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 on 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, they 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.

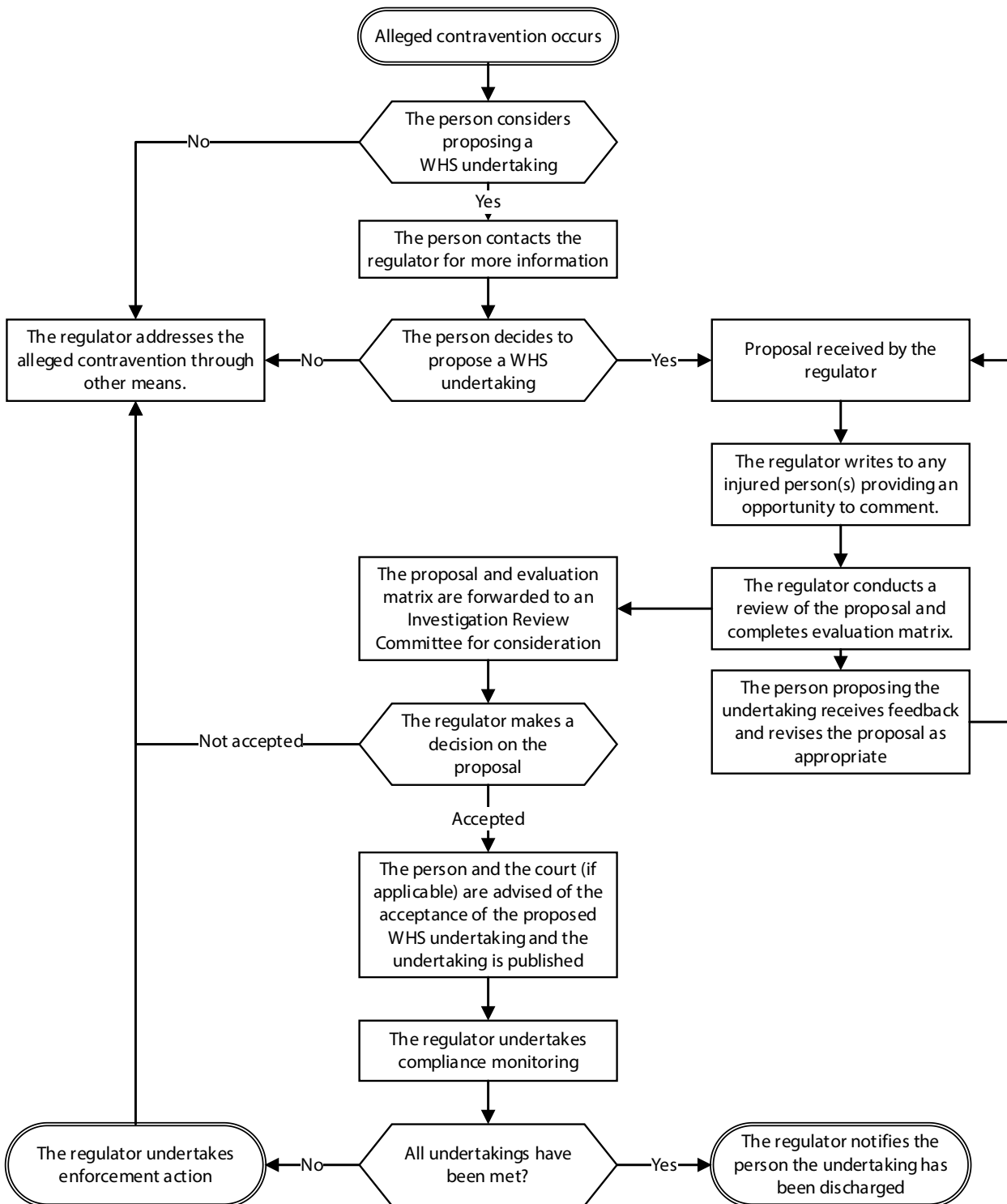
To allow any request to be properly considered, where an application for a WHS undertaking has been received, the application will be placed on hold while the prosecution request is considered.

12 More information

Find these guides on the WorkSafe Tasmania website under the Resources tab (www.worksafe.tas.gov.au/resources):

- WHS undertakings: Information at a glance
- WHS undertakings: Information for an injured person, next of kin or guardian
- WHS undertakings: Information for auditors
- WHS undertakings: Guidelines for proposing a WHS undertaking.

13 Appendix I Flowchart of the WHS undertakings process



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