



WHS undertakings: INFORMATION AT A GLANCE

WorkSafe Tasmania
Department of Justice



Introduction

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

What is a WHS undertaking?

A WHS undertaking is a legally-binding agreement between the regulator and the person who proposed the undertaking. Once accepted by the regulator, the WHS undertaking obliges the person to carry out the specific commitments outlined therein.

The commitments are intended to not only improve health and safety at the workplace, but also to deliver health and safety initiatives to the relevant industry and the broader community.

When a proposed undertaking is accepted, any legal proceedings connected to the alleged contravention are discontinued. Where legal proceedings have not been instituted, acceptance of the WHS undertaking will mean that no proceedings will commence unless the person fails to comply with the terms of the WHS undertaking.

Benefits of a WHS undertaking

A WHS undertaking provides:

- for significant and ongoing commitments that aim to achieve improved WHS outcomes and compliance beyond what is required by the law, whereas legal proceedings may not achieve such outcomes
- an opportunity for organisational reform to improve WHS practices
- a similar deterrent effect to a successful legal proceeding, due to the financial imposition of the WHS undertaking
- an opportunity for the person to communicate to their industry peers and the community about the consequences of unsafe work practices and the opportunities that putting in place safe work practices can bring.

What must be in a WHS undertaking

A WHS undertaking must contain certain information and a number of terms that the person proposing the WHS undertaking commits to, including:

- particulars about the person proposing the undertaking
- details of the alleged contravention
- an acknowledgment that the regulator has alleged a contravention has occurred
- a statement of regret that the incident occurred.

The enforceable terms that are part of the WHS undertaking include:

- ceasing the behaviour that led to the alleged contravention
- a commitment to the ongoing effective management of WHS risks
- details of tangible WHS initiatives that will be delivered to benefit workers, industry and the community
- reimbursing the agreed regulator's costs associated with the WHS undertaking
- disseminate information about the WHS undertaking within the workplace
- where required, implementing and maintaining a work health and safety management system (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*
- where required, undertaking auditing of the WHSMS by a suitably qualified third party auditor; forwarding reports from the audits to the regulator; and implementing the agreed actions from the reports.

The regulator will monitor compliance with the terms of the WHS undertaking.

The process

Proposal

A WHS undertaking may be proposed by a person who is alleged to have contravened the *Work Health and Safety Act 2012*. The regulator is not compelled to accept a WHS undertaking. Further, a WHS undertaking cannot be accepted for an alleged contravention that is a Category 1 offence¹. A WHS undertaking will also not be considered until the regulator is satisfied, following investigation, that a matter does not relate to a Category 1 offence.

Meetings between the regulator and the person proposing the WHS undertaking are available to help the person to determine if an undertaking is likely to be a suitable option and, if it is pursued, the process for its consideration. These meetings are encouraged as a first step before proposing a WHS undertaking.

When the regulator receives a proposed undertaking, any injured persons associated with the alleged contravention are invited to comment.

Evaluation

Proposals are considered on a case by case basis and are assessed as to whether the proposal offers the most appropriate enforcement response for the circumstances of the case.

The evaluation process takes into account:

- 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.

Decisions

If accepted, the proposed undertaking becomes enforceable and any legal proceedings connected to the alleged contravention are discontinued.

Where legal proceedings have not been instituted, acceptance of the WHS undertaking will mean that no proceedings will be initiated while the undertaking remains in effect.

Penalties for non-compliance

If an accepted undertaking is not complied with, the regulator may apply for a court order to enforce compliance and impose financial penalties.

The maximum penalty for failure to comply with a WHS undertaking is \$50,000 for an individual or \$250,000 for a body corporate. The regulator may also seek to prosecute the original alleged contravention.

¹**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

Varying or withdrawing a WHS undertaking

A WHS undertaking may be withdrawn at any time before being accepted by the regulator.

However, after being accepted, the WHS undertaking may only be varied or withdrawn with the prior written agreement of the regulator.

More information

A person (or their representative) who wants to propose a WHS undertaking will find more information in:

- WHS undertakings: An overview
- WHS undertakings: Guidelines for proposing a WHS undertaking.

A person who has been injured at work, or who is the next of kin or guardian of a person injured at work will find more information in:

- WHS undertakings: Information for an injured person, next of kin or guardian.

An auditor involved with WHSMS audits will find more information in:

- WHS undertakings: Information for auditors.

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

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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