



**WHS undertakings:
INFORMATION FOR AN INJURED
PERSON, NEXT OF KIN OR GUARDIAN**

Information for an injured person, next of kin or guardian

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 undertakings.

What must be in a WHS undertaking

A WHS undertaking proposal must incorporate certain information and a number of terms that support the assurance of future behaviour. The information required includes:

- particulars about the person or entity proposing the WHS 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 resulted in the alleged contravention
- a commitment to the ongoing effective management of WHS risks
- details of activities that will be delivered to benefit workers, industry and the community
- details of the safety management system that will be retained or will be implemented at the workplace.

How are proposed undertakings decided?

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 will take 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.

Benefits of a WHS undertaking

Proposed undertakings must contain a substantial demonstration of commitment to future WHS behaviour and in this regard requires a significant organisational commitment.

A WHS undertaking is:

- a long-term effective remedy for an alleged contravention compared to a prosecution resulting in a fine, which is finalised when paid, and may not lead to substantial changes in the workplace
- an opportunity for organisational reform to improve WHS practices
- aimed at encouraging, enhancing and enforcing compliance with WHS laws
- an approach that does not require the injured person to give evidence in court
- a deterrent to future breaches of the legislation.

Possible outcomes

WHS undertakings can deliver flexible and broad outcomes, compared to those delivered through prosecution. For example, a WHS undertaking may commit a person to:

- conducting, facilitating or funding research into a safety issue relevant to the industry
- implementing specific projects, such as special training programs to address particular needs
- 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.

Input from injured persons, next of kin or guardians

The regulator considers a range of factors when assessing the merits of a WHS undertaking. This includes considering information from injured persons, next of kin or guardians (as relevant).

The regulator will seek to discover the impact that the incident has had on any injured person, whether the person has been rehabilitated and returned to work or returned to independence, if applicable; or whether there are other WHS issues that remain of concern to the person.

Injured persons, next of kin or guardians (as relevant) will be informed by the regulator that a WHS undertaking has been proposed.

The injured person, next of kin or guardians (as relevant) will be provided an opportunity to comment on:

- the incident
- the safety management at the workplace
- 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 undertaking has provided to improve the injured person's quality of life since the incident
- whether a WHS undertaking would be an acceptable alternative to the matter being addressed through legal proceedings.

The injured person, next of kin or guardians (as relevant) will be advised in writing of the regulator's decision in relation to the proposed undertaking. If the proposal is accepted, generally a copy of the undertaking will be included with the letter.

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.

Penalties for non-compliance with WHS undertakings

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

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.

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

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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