



SAFework NSW ENFORCEABLE UNDERTAKINGS GUIDELINES

JANUARY 2018

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INTRODUCTION

SafeWork NSW is the state's work health and safety regulator. We work with the NSW community to reduce work related fatalities, serious injuries and illnesses and make it easier to do business safely.

At SafeWork NSW, we aim to make sure our regulatory approaches promote a competitive, confident and protected NSW. See *Our approach to work health and safety regulation* (catalogue no. SW08027). In realising this objective, the work health and safety laws provide SafeWork NSW with a range of functions including monitoring and enforcing compliance with the law.

SafeWork NSW secures compliance by taking enforcement action, issuing improvement and prohibition notices and sanctions based on the seriousness of the risk and/or offence and the potential for harm in the workplace¹.

A contravention of the *NSW Work Health and Safety Act 2011* (the Act) is serious. Failing to protect workers and others who may be affected by that work is a criminal offence which in some instances may warrant prosecution in a court of law. A court imposed sanction or a prosecution is one enforcement option. An enforceable undertaking (EU) is an alternative enforcement option to a prosecution.

SCOPE

These guidelines set out the approach SafeWork NSW takes to considering an offer of an EU from a person who has allegedly committed an offence against the Act.

One of the objects of the Act is securing compliance with the Act through effective and appropriate compliance and enforcement measures².

According to the Act, SafeWork NSW, as the regulator, may accept a written undertaking (an EU) given by a person in connection with a matter relating to a contravention or alleged contravention by the person of the Act. An EU cannot be accepted for a contravention or alleged contravention that is a Category 1 offence. Please refer to the section 'when will an EU not be accepted?' for further information.

These guidelines explain the principles SafeWork NSW applies to the use of EUs as an enforcement measure.

WHAT IS AN EU?

An EU is a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for an alleged contravention of the Act. An EU provides an opportunity for significant work health and safety reform to be undertaken³.

An EU is a high level sanction used where the alleged contravention is of a serious nature. It is a written promise made by the person to undertake certain activities within a particular timeframe.

Typically, the activities required under an EU are substantial and will include specific initiatives to be undertaken by the person that will deliver positive safety benefits to the workplace as well as benefits which extend to the industry and community. The effort and commitment required of a person in delivering the initiatives within an EU to completion are significant in terms of cost and resources.

After considering the merits of an EU proposed by a person, SafeWork NSW may accept the EU as an alternative to prosecuting the person for the alleged contravention.

¹ SafeWork NSW, *Our Approach to Work Health and Safety Regulation*.

² *Work Health and Safety Act 2011*, Section 3(1)(e).

³ National Compliance and Enforcement Policy, Section 13.

WHY AN EU AND NOT A PROSECUTION?

SafeWork NSW follows the graduated approach to compliance and enforcement adopted by most work health and safety regulators throughout Australia⁴. While every effort is made to support the competitiveness and confidence of business through information and advisory services, SafeWork NSW will enforce compliance with work health and safety laws as appropriate to the relevant circumstances.

Where a breach of work health and safety laws is of a serious nature, the enforcement response may involve a high level sanction. High level sanctions include court imposed penalties obtained via a prosecution of the alleged contravention in a court of law.

SafeWork NSW may accept an EU as an alternative to a prosecution if appropriate given the circumstances, and if it is likely to deliver superior work health and safety outcomes to a court sanction.

In some instances, an EU may be a preferred approach to a prosecution because it is expected to achieve outcomes that cannot generally be achieved by the order of a court. The range of actions available through an EU can provide a more systematic and enduring response, tailored to the nature of the non-compliance with broader benefits for the industry and community. In particular, an EU can be used as an incentive to improve health and safety rather than as a punishment for having failed to comply with work health and safety laws.

A person is already required by law to meet their statutory work health and safety obligations. An EU is intended to achieve work health and safety outcomes in the affected workplace and beyond to the relevant industry and our community that strengthens compliance and/or builds sustainable performance.

An EU does not constitute an admission of guilt by the person providing it in relation to the alleged contravention. Court proceedings cannot be brought against a person for the alleged contravention to which an EU relates while the EU is in effect and is being complied with.

WHO CAN ACCEPT OR REJECT AN EU?

The decision to accept or reject an EU is made by SafeWork NSW.

WHEN CAN AN EU BE PROPOSED?

Generally, SafeWork NSW will consider interest in an EU after charges have been laid and proceedings have commenced against the person in respect of an alleged contravention.

WHEN WILL AN EU NOT BE ACCEPTED?

The Act prohibits the acceptance of an EU for a Category 1 offence⁵. A Category 1 offence is one where a person, without reasonable excuse, engages in conduct that exposes an individual to a risk of fatal or serious injury or illness and the person is reckless to that risk.

There are some situations where an EU may not be accepted as an appropriate enforcement outcome. For example, the alleged contravention may be of such a serious nature that a prosecution is warranted and SafeWork NSW will seek a court imposed sanction. Please refer to the section, 'What determines whether an EU will be accepted?' for further information.

⁴ National Compliance and Enforcement Policy, Section 6.

⁵ *Work Health and Safety Act 2011*, Section 216(2).

WHAT DETERMINES WHETHER AN EU WILL BE ACCEPTED?

SafeWork NSW will generally consider an EU as an alternative to a prosecution if doing so is in the *public interest* and the person proposing the EU is able to demonstrate that the EU will deliver tangible work health and safety benefits to the workplace, industry and community. *SafeWork NSW Prosecution Guidelines* (2017) sets out the criteria applied when considering the *public interest*.

The assessment by SafeWork NSW of a proposed EU will involve two stages of consideration; an 'eligibility' assessment followed by an 'evaluation' assessment.

1. **Eligibility** – The first stage is initiated from an expression of interest by the person to SafeWork NSW about the possibility of an EU. It involves consideration as to whether an EU may be an appropriate enforcement measure, taking into account the circumstances of a particular incident and the compliance history of the person.
2. **Evaluation** – The second stage is initiated when SafeWork NSW determines that an EU may be a viable option after assessing the person's eligibility. The person submits a written EU proposal to SafeWork NSW and the merit of the proposal is then considered.

STAGE 1: CONSIDERATIONS APPLICABLE TO 'ELIGIBILITY'

In assessing whether a matter may be determined as eligible for an EU, SafeWork NSW will consider the following factors:

- (i). the level of alleged **culpability** of the person;
- (ii). the degree of **risk** arising from the alleged breach; and
- (iii). the person's history of **compliance** with the Act.

These factors are taken into account as part of the *public interest* test in accordance with *SafeWork NSW Prosecution Guidelines*. The guidelines note that *public interest* is the paramount concern to be taken into account in the decision to prosecute⁶. The *public interest* test always informs SafeWork NSW's approach to breaches of work health and safety laws.

However, the factors listed above will be specifically reconsidered in the context of an expression of interest by a person, to determine if an EU is an appropriate enforcement measure. The relative weight given to each factor will depend on the particular circumstances of the alleged contravention and the compliance history of the person.

Should SafeWork NSW determine that a person is not eligible for an EU, the person will be provided a reasonable opportunity to address the reasons prior to a final decision by SafeWork NSW.

Culpability

Culpability refers to the extent to which the person may be held responsible for the incident and the nature of the alleged misconduct which gave rise to the alleged contravention.

Consideration of culpability will involve an examination of the work health and safety management practices of the person, including what they knew or what they should have reasonably known about the hazards present in the workplace and what they did or should have reasonably done to eliminate or minimise the risk arising from those hazards. This involves an objective assessment of what action, or failure to act by the person, is considered to have contributed to the incident.

⁶ *SafeWork NSW Prosecution Guidelines 2017*, Section 3.5.

Risk

Work health and safety legislation is risk based legislation, aimed at preventing exposure to the risk of harm⁷. For this reason, it is the seriousness of the risk arising from the alleged breach rather than the consequence of the breach that will be considered.

However, a fatality or a serious injury may provide a clear indication of a failure to control risks and will be given significant attention in deciding whether an EU is an appropriate enforcement measure.

Assessment of the seriousness of the risk arising from the alleged contravention will usually involve consideration of the following factors:

- (i). the number of people put at risk;
- (ii). how long the risk existed;
- (iii). the degree of consultation that occurred within the workplace, leading up to the alleged contravention; and
- (iv). the actual or potential consequences of the risk created by the alleged contravention.

The views of the injured worker and/or family are important. Those views can shed some light on the extent to which workers were exposed to the risk of harm and the effectiveness of measures to control those risks. Accordingly, the views of the injured worker and/or family will be considered as part of the overall assessment of risk.

History of compliance

History of compliance refers to the consideration of any evidence of prior non-compliances with work health and safety obligations, whether the person was notified of their obligations by SafeWork NSW, and the behaviour of the person in response to previous enforcement and prevention action.

The compliance history of the person will be assessed against a background of seriousness and/or relevance of the compliance history to the alleged contravention when deciding whether an EU may be an appropriate enforcement measure.

If there is a history of non-compliance and the person has previously shown insufficient regard for compliance with work health and safety laws, this behaviour may lessen the likelihood of an EU being considered an appropriate enforcement measure by SafeWork NSW.

An EU will generally not be appropriate where any of the following circumstances exist:

- The person has more than two prior convictions or findings of guilt against the Act, arising from separate investigations unless the last prior matter concluded more than five years prior to the alleged contravention that is the subject of the proposed EU; or
- if the person has a prior conviction or finding of guilt against the Act which was connected to the fatal injury of a person, whether or not the prior matter is said to have directly caused the fatal injury, unless the prior matter was more than five years prior to the alleged contravention that is the subject of the proposed EU.

STAGE 2: CONSIDERATIONS APPLICABLE TO ‘EVALUATION’

If SafeWork NSW decides that an EU is potentially appropriate following an assessment for eligibility, the second stage is where the merits of a proposed EU are considered.

At this stage, the person prepares and submits a written EU proposal. The proposal should include essential details of both a procedural and substantive nature. The content of the proposed EU will be evaluated against a backdrop of work health and safety outcomes that are required from the EU.

⁷ *Work Health and Safety Act 2011*, Section 3(1)(a).

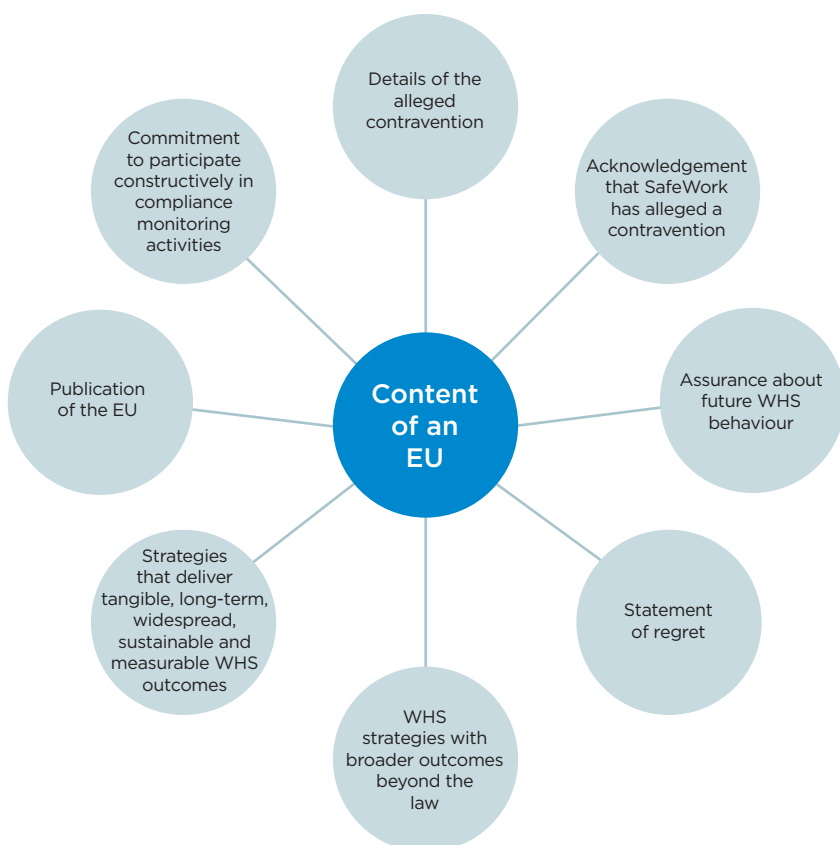
Given that consideration of culpability, risk and compliance history has previously been undertaken, the proposal will be assessed by SafeWork NSW with consideration to the following factors:

- the degree to which the EU strengthens compliance and/or builds sustainable performance, beyond the person's obligations to comply with the Act;
- whether the EU offers long term, sustainable, measurable and tangible work health and safety benefits to:
 1. the workplace;
 2. the industry; and
 3. the community.
- the extent that the strategies proposed link to the alleged contravention and the work health and safety duties of the person;
- the person's conduct in respect of mitigation and remedial action regarding both the alleged contravention and any person effected by the alleged contravention;
- support provided to the injured person(s) or proposed to be provided to the injured person(s) to overcome the injury/illness and recover at work;
- whether the person is likely to comply with the EU; and
- any other matter that SafeWork NSW considers relevant to the merit of and compliance with the EU.

PREPARING AN EU

To allow for the timely development and effective monitoring of an EU, the proposal will need contain certain information and a number of mandatory terms.

The following diagram outlines what is typically included in an EU proposal⁸:



⁸ SafeWork NSW, Enforceable Undertakings Customer Service Standard.

The proposal will be considered by SafeWork NSW, subject to it containing all relevant procedural information and sufficient detail in relation to proposed strategies, actions, milestones, costs and other information as requested.

Prosecution proceedings may be adjourned to enable consideration of an EU. If an EU is rejected, then the prosecution proceedings will be resumed.

THE EU EVALUATION DECISION BY SAFEWORK NSW

Should SafeWork NSW intend to reject a proposed EU, the person will be provided a reasonable opportunity to address the reasons prior to a final decision by SafeWork NSW.

Should an EU be rejected by SafeWork NSW, the person will be provided with written reasons.

Should an EU be accepted by SafeWork NSW, it will be published on the SafeWork NSW website. SafeWork NSW will provide reasons for acceptance of an EU on its website.

BREACHES OF ACCEPTED EUs

Once an EU is accepted, it is legally binding. A breach of an EU involves failure to comply with the terms of the EU. As an EU is enforceable by the court, a breach may result in significant penalties including:

- a direction to comply with the EU;
- discharge of the EU;
- monetary fines;
- court costs;
- SafeWork NSW costs in monitoring compliance with the enforceable undertaking in the future; and/or
- commencement of proceedings for the original alleged contravention.

FURTHER INFORMATION

For further information, please contact the EU Advisory Service on 13 10 50, or visit our website www.safework.nsw.gov.au/law-and-policy/enforcement/enforceable-undertakings

