

Information for victims and whānau about understanding enforceable undertakings

Enforceable undertakings (EUs) are an alternative intervention which is available to someone who has breached (including an alleged breach) the Health and Safety at Work Act 2015 (HSWA).

EUs are allowed under HSWA and are designed to provide an opportunity to make amends for an incident. This requires a commitment to drive health and safety change by making health and safety improvements to their workplace, the wider industry, their local community, and importantly for you – amends to victims and their loved ones. The undertaking is legally binding, and the activities must ‘raise the bar’ or promote progressively higher standards of health and safety in the given workplace, industry or sector. It is not a softer option.

EUs will not be imposed on a duty holder and we will not offer it – it is a voluntary initiative. A duty holder must apply for an EU by ‘registering an interest’, followed by an application for an EU. If we accept the EU, we do so because we think the benefits are worth it. We will monitor the EU and ensure it is completed to a high standard. If the duty holder doesn’t meet our expectations, we have a range of options, including the ability to revisit the prosecution.

Timelines and the victims and whānau’s role

Accepting an EU requires charges to be withdrawn (where prosecution action has been taken). The Courts will usually adjourn proceedings to allow the duty holder time to progress through the EU process. EU applications usually have a number of aspects that must be covered, which means that this can take time to prepare and submit for consideration.

Once submitted, an EU Panel considers the application. The Panel is made up of a small group of senior advisors and senior leadership stakeholders representing the strategic and operational priorities of WorkSafe.

The final agreement is between the duty Holder and WorkSafe. Ultimately reaching agreement is voluntary, and several factors are considered. This is explained further below.

As part of the process your views, which are important, are considered by the Panel. Regardless of whether the duty Holder has sought your views while preparing their application, once the Panel has received the application, they/we will seek and consider your views on the application. We will discuss with you whether you support the EU and if appropriate, your views on specific activities or initiatives proposed. The Panel can also consider information from you relating to the incident and how it has impacted you.

An EU is not a simple or easy way out. It’s a serious and legal commitment. The duty holder must comply with the terms and conditions of the agreed EU, which we will closely monitor. If they break these terms, WorkSafe can resume prosecution and even consider additional charges related to the EU violation. The duty holder is required to submit regular and final compliance reports to WorkSafe. The EU remains in effect until it is formally discharged.

A commitment to drive health and safety change and make amends

Through an EU, the duty holder has an opportunity to undertake a range of activities (in addition to other commitments in the final agreement) for the benefit of their workers, the wider industry and local community. The EU must also include acceptable amends to any victims. Your opinions are valuable and taken into account along with the commitments and actions outlined by the EU. It’s important to consider the overall benefits of the EU, not just in terms of amends, but also in terms of promoting higher standards and long-lasting improvements in health and safety within workplaces and industries. The Panel consideration is

not a negotiation. The applicant makes an application offering certain actions and undertakings, and we decide whether to accept or not, the process looks like this:

1. Duty holder **registers interest** with WorkSafe in an EU.
2. Duty holder **submits an application**.
3. An EU internal **panel will consider** the application, then either:
 - a. provide feedback to the applicant
 - b. recommend the application is declined, or
 - c. recommend the application is accepted.
4. Then a final **decision-making** process to accept/decline will take place.

The EU application process can take time, often months. We'll need to request court adjournments to the prosecution to consider the application – and we need to carefully consider all the factors to ensure we get it right.

Once an EU is accepted, it is made public. We are required by HSWA to make the outcomes of EUs publicly available on our website. This includes when we accept an EU and our reasons for accepting it.

Factors considered

Firstly, we look at the incident in context:

- What's happened?
- What's the history of the duty holder?
- Are there any aggravating or mitigating factors?

Then, we consider the activities (proposed benefits to health and safety **over and above compliance** with HSWA).

Lastly, we review the application based on WorkSafe's strategic priorities. We don't assign specific importance to any particular aspect mentioned above. Instead, we evaluate the entire proposal in light of the incident's circumstances.

What about compensation?

The Courts refer to 'reparation' and also use the term 'amends', as it gives us a slightly wider ability to consider (different) offers of compensation.

When it comes to the total payment, we compare the amends offered through the EU with the likely amount ordered by the court as reparation. Our aim is to make sure that you are not disadvantaged by receiving amends through the EU instead of the matter going through the court. However, it's important to note that we cannot negotiate on your behalf.

How to make your views on an EU known

This can happen in a number of ways, as many factors must be considered and may depend on:

1. Process: what stage is the prosecution at?
What stage is the EU application and process at?
2. Relationships: what is the relationship between all parties involved and how you can best be engaged with for obtaining your views?

You will have a primary contact at WorkSafe (normally the lead investigator for the file known as the Officer in Charge (OIC)). They will let you know if an EU process has been started, explain the process, and what you can expect.

It is our expectation that the duty holder will provide you with relevant information about the EU as it progresses (often before we know anything about it) but we realise that this relationship may sometimes be difficult. However, in the first instance, this is where specific information on proposed activities in the EU should come from.

We're here to help you navigate this as easily as possible, so you can contact the EU team directly. We'll be happy to email or call you to discuss:
enforceableundertakings@worksafe.govt.nz

The EU Panel want to understand your views – this is often as easy as a discussion with the OIC or EU team. We'll also consider written submissions from yourself or any representatives you nominate.

What else to expect?

How long this will take to complete will vary. Often there will be large amounts of time when nothing seems to be progressing, and then everything happens at once. But we'll work with you to guide you through this. If you have been keeping some notes or a journal as a record of things that have affected you since the incident, that might help you with preparing to share your views with us. We will keep you updated and informed as the EU progresses through the stages – but please keep in mind that while the matter is before the courts, WorkSafe staff are unable to discuss anything which could jeopardise the prosecution.

We'd rather the incident that has impacted you had not occurred in the first place. EUs are an alternative resolution opportunity to try and prevent these things happening again. An accepted EU demonstrates a commitment and provides an opportunity to drive higher standards and better health and safety outcomes to improve health and safety for current and future workers in Aotearoa.

More detailed information for duty holders EUs, and contacting the EU team, can be found on our website:
worksafe.govt.nz