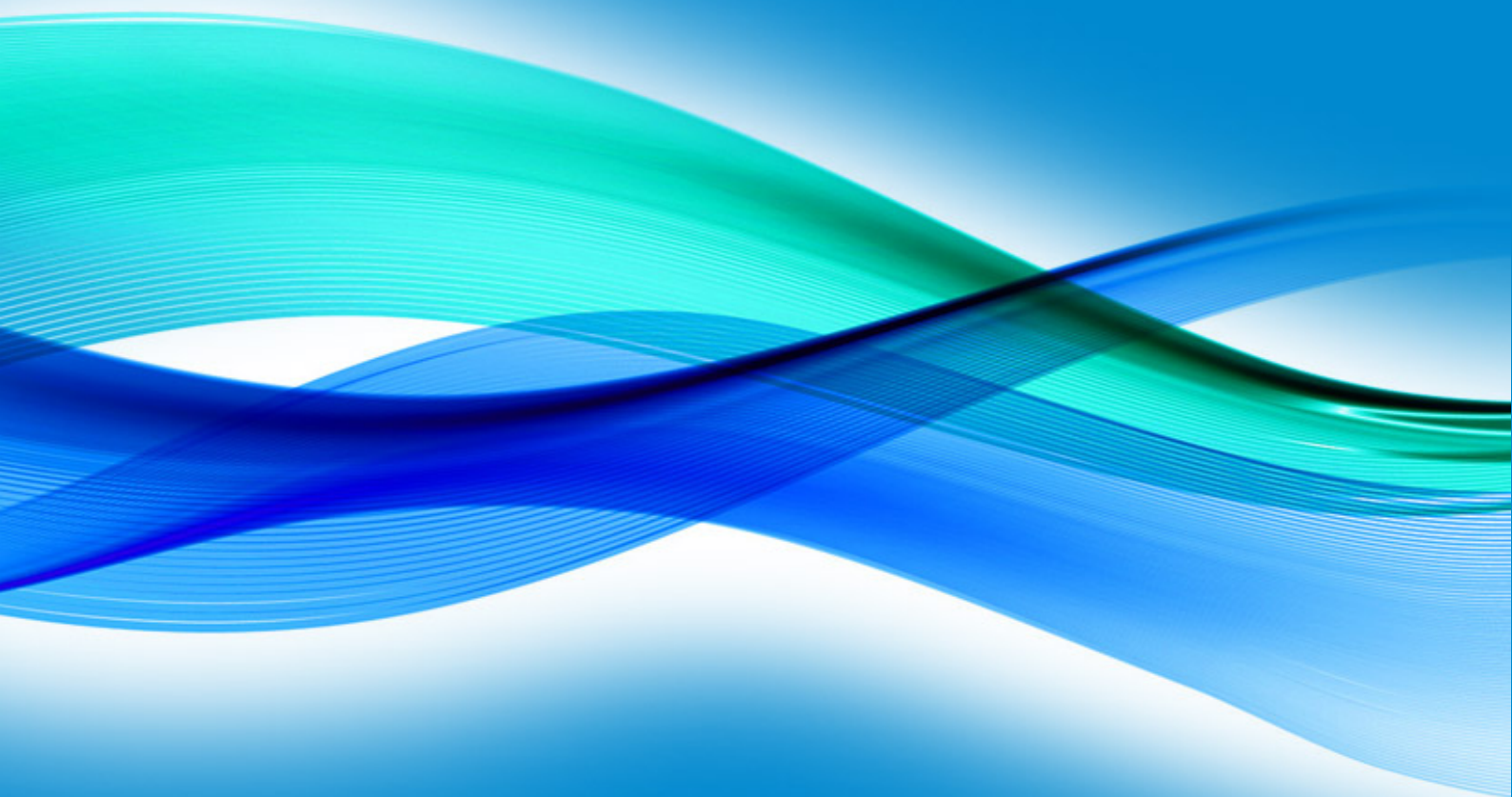


Enforceable Undertakings

Operational Policy



Enforceable Undertakings Operational Policy

This policy sets out Maritime NZ's approach to enforceable undertakings under the Health and Safety at Work Act 2015 (HSWA). It will be used to guide Maritime NZ's decision-making about enforceable undertakings under HSWA.

Scope of the Document

This document outlines how Maritime NZ will deliver enforceable undertakings, specifically:

- when a duty holder can apply for an enforceable undertaking
- the key stages of an enforceable undertaking, including:
 - how Maritime NZ will carry these out, and
 - the criteria that will be applied at specific decision points.
- what happens if a duty holder does not comply with an enforceable undertaking
- what Maritime NZ's processes are for variations and withdrawals of an accepted enforceable undertaking

Out of Scope

This policy is not an operational guidance document. For that information, you will need to read the enforceable undertaking procedures and guidance information on the Maritime NZ website.

Related policies and procedures

The enforceable undertakings operational policy should be read in conjunction with:

- Part 4, sections 123-129 of the Health and Safety at Work Act 2015
- Maritime NZ's Compliance Operating Model
- Maritime NZ's Prosecution Policy
- Maritime NZ's Enforceable Undertaking Practice Guide

The enforceable undertaking

What is an enforceable undertaking?

An enforceable undertaking is an enforcement pathway that is permitted under Part 4 of HSWA. It can be taken following a contravention of the Act.

It is one of several enforcement pathways that are available to Maritime NZ with decisions made in line with Maritime NZ's Compliance Operating Model.

An enforceable undertaking allows a duty holder to voluntarily enter into a binding agreement with Maritime NZ and is generally used as an alternative to prosecution. It outlines actions the duty holder will undertake to address the contravention and is expected to deliver activities which meet the objectives outlined above.

An enforceable undertaking is not imposed on a duty holder. A duty holder must first express an interest and submit an application. Maritime NZ then considers whether or not it agrees with the value proposition of the actions detailed in the application and whether it will accept or reject a proposed undertaking.

Maritime NZ is not compelled to accept an application for an enforceable undertaking. However, once accepted, it is legally binding – the breach of an enforceable undertaking is a stand-alone offence under HSWA.

What are the objectives of an enforceable undertaking?

The key objectives of an enforceable undertaking are to:

- support progressively higher standards of work health and safety in a given industry or sector for the benefit of the:
 - workers and/or work and/or workplace
 - wider industry or sector, and
 - community
- provide acceptable amends to any victim(s)
- support Maritime NZ to meet its strategic priorities.

When can a duty-holder apply for an enforceable undertaking?

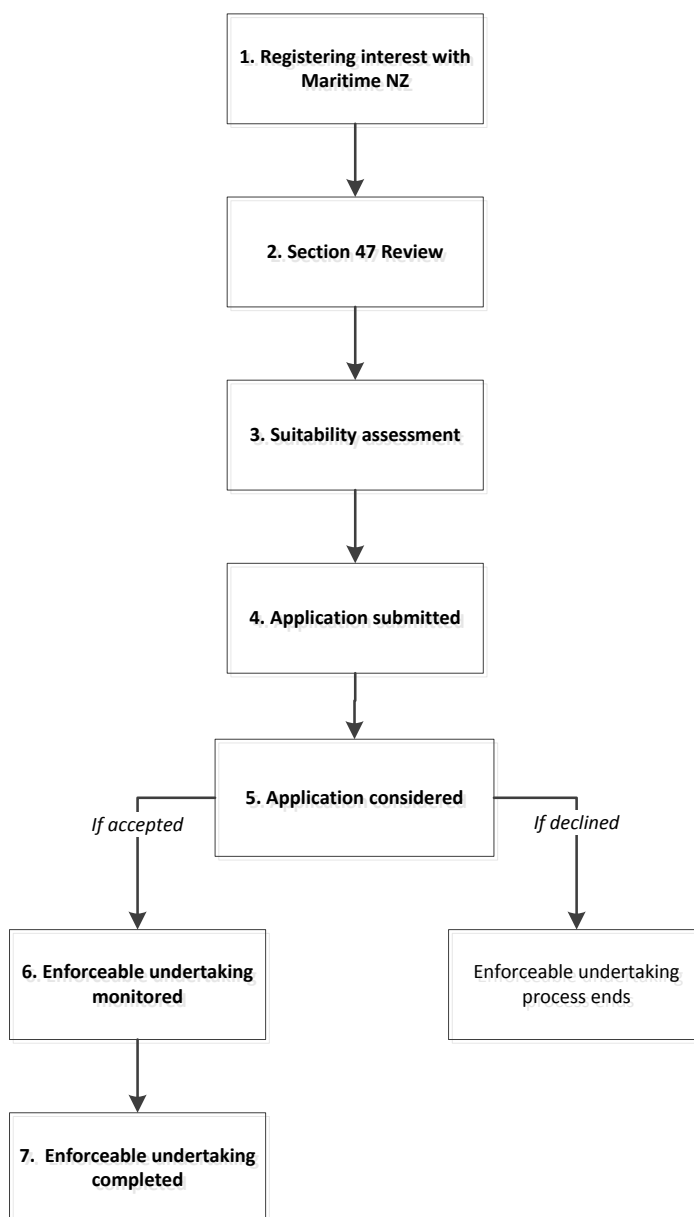
A duty holder can apply for an enforceable undertaking for any contravention of HSWA that may lead to, or has resulted in, a prosecution under the Act.

Maritime NZ must not accept an enforceable undertaking for any contravention that it believes would amount to an offence against section 47 of HSWA (offence of reckless conduct in respect of duty).

Maritime NZ is unlikely to accept an enforceable undertaking if it does not pass the suitability assessment (refer to section 3, suitability assessment, for details).

The 7-Step Process

The enforceable undertaking process has 7 broad steps. These are shown in the diagram below:



1. Registering interest with Maritime NZ

Any duty holder seeking an enforceable undertaking must first register their interest with Maritime NZ.

A registration of interest must be made in writing to the Director of Maritime NZ, through the Maritime NZ Enforceable Undertakings Team (the EU Team). The EU Team:

- administers the enforceable undertaking process
- provides an advisory function to the sector and within Maritime NZ

- monitors all accepted enforceable undertakings.

An enforceable undertaking will only be considered following a contravention of the Act that reaches the threshold for legal proceedings.

Interest can be registered at any time. However, Maritime NZ will only consider an enforceable undertaking once the investigation of the contravention is complete.

Irrespective of having received a registration of interest, Maritime NZ will continue with legal proceedings as an independent but parallel process.

2. Section 47 Review

Maritime NZ will conduct a legal review to determine if the contravention amounts to an offence against section 47 of HSWA (offence of reckless conduct in respect of duty).

This will only happen once the duty holder has registered interest and Maritime NZ has completed its investigation.

If Maritime NZ believes the contravention would amount to a section 47 offence, then it must not accept an enforceable undertaking.

If the contravention is deemed to not be a section 47 offence, Maritime NZ will apply the suitability assessment.

3. Suitability assessment

Maritime NZ will apply the suitability assessment. This assessment considers whether an enforceable undertaking is a suitable enforcement outcome given the specific circumstances of a contravention.

Maritime NZ is unlikely to accept an enforceable undertaking for a contravention where it considers two or more of the following measures apply:

- Did the contravention result in a fatal injury or illness?
- Was there potential for the contravention to result in multiple fatalities or for multiple victims to develop a fatal illness?
- Does the contravention have any aggravating factors?
- Does it demonstrate repeat conduct by the duty holder?
- Did it involve offending against a vulnerable victim(s) ?
- Is an enforceable undertaking likely to be challenged by a victim (or their representative), union or employer organisation?
- Could accepting an enforceable undertaking be perceived as contrary to a stated government priority or policy?

The EU Team will review the contravention, consider it against the measures and make an interim assessment. The EU Team Manager will give final approval of the assessment outcome.

Once the suitability assessment is complete, the EU Team will then advise the duty holder in writing

that Maritime NZ is ready to consider an application.

For any contravention where two or more of the measures are deemed applicable, Maritime NZ will also advise the duty holder in writing that it is unlikely a proposed enforceable undertaking will be accepted. This correspondence will include the relevant measures.

The duty holder can still choose to submit an application, regardless of the outcome of the suitability assessment.

Advising a duty holder that Maritime NZ is ready to consider an application is not a commitment on the part of Maritime NZ to enter in to an undertaking.

4. Submitting an application

Any duty holder submitting an enforceable undertaking application must do so in writing using Maritime NZ's enforceable undertaking application template.

Receipt of an application is not a commitment on the part of Maritime NZ to enter into an undertaking.

Applications must include commitments that would promote the objectives or purposes of health and safety legislation for the benefit of one or more of the following:

- the workers and/or work and/or workplace
- the wider industry or sector
- the community.

Promoting the objectives or purposes of health and safety legislation means the commitments should “raise the bar” or promote progressively higher standards of work health and safety in the given industry or sector.

The proposal must:

- Account for the benefits that accrue to the duty holder by the prosecution not proceeding. This includes avoiding a conviction and other sentencing outcomes.
- Indicate whether the duty holder has undertaken enquiries with any applicable union and within in their sector/industry about the proposed measures and what feedback was received.
- Include appropriate amends for any victim (monetary or otherwise)
- Indicate whether the duty holder has had contact with the victim about the proposed amends and measures and what feedback was received.
- Acknowledge the underlying conduct or failures that have given rise to the contravention.

One of Maritime NZ's strategic priorities is to target risk. Therefore Maritime NZ:

- Will align its enforceable undertaking decisions with any stated aim or strategy in a given part of the sector.
- Expects duty-holders from high risk parts of the maritime sector to do more in their application to promote the objectives or purposes of health and safety legislation.

Section 123(3) of HSWA provides that the giving of the enforceable undertaking does not constitute an admission of guilt in relation to the contravention. However, a proposal must acknowledge the underlying conduct or failures that have given rise to the contravention and accept responsibility for these. Maritime NZ expects this to include details of the relevant steps/measures that the duty holder should have taken.

Irrespective of having received an application, any legal proceedings Maritime NZ has initiated for the contravention will continue until the outcome of the application is finalised.

5. Considering the application

When assessing an application, Maritime NZ will consider whether the proposed enforceable undertaking constitutes a proportionate enforcement outcome, taking into account the following factors:

- The nature of the proposals in the application and the benefits that would be realised to the health and safety system from them.
- The nature of the duty holder's contravention and how serious it was.
- Information received from any interested party in relation to the contravention.
- Mitigation and remedial action already taken, or planned, by the duty holder regarding both the contravention and any person affected by it (including victims).
- The duty holder's past performance and history of compliance with health and safety legislation.
- Any likely outcome if the matter were dealt with by legal proceedings.
- How the proposal promotes Maritime NZ's objectives and supports its strategic priorities.
- Any other matter which Maritime NZ thinks relevant.

Maritime NZ will contact victim(s) to either confirm any information they have provided to Maritime NZ, or if they have not provided any information, to seek their views on the proposal. Views of victim(s) are important and will be actively considered as part of our decision-making process.

Voluntary action taken by the duty holder following the contravention beyond what is required to meet their existing obligations under Health and Safety legislation can be included in the application.

Maritime NZ will not accept a proposed enforceable undertaking where it:

- Contains a denial of responsibility for the contravention.
- Does not contain a statement acknowledging that harm was caused or risked by the contravention.
- Contains any clauses that may lead to possible non-compliance with the enforceable undertaking.
- Omits to include, or down-plays, relevant details of the conduct which gave rise to the enforceable undertaking and Maritime NZ's concerns about the conduct.

- Contains any terms that may impose an obligation on Maritime NZ or any other party without that party's consent.
- Only contains commitments that would equate to the duty holder meeting their existing obligations under Health and Safety legislation.

Applications will be considered by the Maritime NZ Enforceable Undertaking Review Panel (the EU Panel). The EU Panel will comprise a Compliance Manager and two managers from other business groups that participate in Maritime NZ's compliance intervention panel.

To maintain consistency, Maritime NZ will aim to keep panel membership the same over time. However, Panel membership can change over time to manage conflicts and in response to staff absences and/or changes in circumstances.

The Panel cannot include the enforceable undertakings Decision Maker, or any person who has been involved with investigating, or providing advice on, the contravention.

Maritime NZ must be satisfied that Panel members do not have any reasonably foreseeable conflict of interest with a given enforceable undertaking application.

It may be that conflicts of interest are inevitable in some contexts and where that is the case, Maritime NZ needs to be satisfied that the Panel member can appropriately manage the conflict.

The EU Panel is not a decision-making body. It provides advice to the Decision Maker on whether or not the proposal should be accepted.

The EU Panel will review a proposal and determine whether:

- the EU Team will refer it back to the duty holder with feedback and a request they re-submit
- recommend to the Decision Maker that it is accepted, or
- recommend to the Decision Maker that it is declined.

It is not mandatory for the EU Panel to refer an application back to the duty holder with feedback and a request that they re-submit. If they choose to do so, it does not form a commitment on the part of Maritime NZ to enter in to an undertaking.

To support their discussions, the EU Panel can request information from subject matter experts on specific issues or questions relating to their areas of knowledge and expertise. Subject matter experts include (but are not limited to):

- Maritime NZ's Legal Services
- the lead investigation Inspector and/or their Manager, and
- Maritime NZ technical specialists.

There will be a written account of any advice provided by a subject matter expert. This will be the responsibility of the EU Team.

The Deputy Director Compliance Systems Delivery is the enforceable undertakings Decision Maker. The Decision Maker will consider the EU Panel's recommendation and make a decision to accept or decline a proposal.

After receiving the EU Panel's recommendation, the Decision Maker can:

- seek legal advice from Maritime NZ's Chief Legal Advisor, and/or
- at their discretion, nominate that a decision on a given proposal is made by the Director of Maritime NZ.

If the decision is to accept the enforceable undertaking, Maritime NZ will:

- take all reasonable steps to discontinue any prosecution that has been taken in relation to the contravention as soon as practicable
- advise the duty holder of the decision and reasons for the decision
- work with the duty holder to develop and agree a communication protocol about the enforceable undertaking
- notify victim(s) of the decision and reasons for the decision, and
- publish the accepted enforceable undertaking in full, including the reasons for the decision.

Maritime NZ expects the duty holder to agree a joint public statement immediately following the approval of an enforceable undertaking.

Publication of an enforceable undertaking will include details of any financial amends made to the victim(s). These details will only be redacted in exceptional circumstances. Any decision to redact information will be made by the Decision Maker.

If the decision is to decline the proposal the Decision Maker will, in writing:

- advise the duty holder of the decision, and reasons for it, and
- provide the duty holder with an opportunity to make a submission addressing the reasons for the decision.

The Decision Maker will review the submission and decide whether or not to confirm the decision to decline. If decision-making has been deferred, this process will be undertaken by the Executive Leadership Team or a sub-set of that team.

If the decision is still to decline the enforceable undertaking, Maritime NZ will:

- continue with any legal proceedings that have been taken in relation to the contravention
- advise the duty holder of the decision and reasons for the decision, and
- notify victim(s) of the decision and reasons for the decision.

6. Monitoring the enforceable undertaking

Each enforceable undertaking will be monitored against key milestones throughout its life. This will allow Maritime NZ to assess whether or not it is being complied with and whether the benefits expected from the enforceable undertaking have been realised.

The EU Team will determine how an enforceable undertaking will be monitored and will be responsible for monitoring it once it is accepted. This may include directing inspectors to carry out site visits.

A monitoring schedule will be developed and included as part of Maritime NZ's acceptance of a proposed enforceable undertaking. The schedule will specify the key milestones of the enforceable undertaking and how these will be monitored by Maritime NZ. This may include (but is not limited to):

- scheduled site visits, and
- the duty holder providing:
 - acceptable evidence of a key milestone being met
 - interim progress reports, and
 - a final compliance report.

A timeframe for completion will also be set by the EU Team. Timeframes will be based on the details provided by the duty holder in the enforceable undertaking application and will be confirmed in the monitoring schedule.

It is the duty holder's responsibility to satisfy Maritime NZ that they are fulfilling the terms of the enforceable undertaking and to provide reports on time as detailed in the schedule.

Maritime NZ will use the monitoring schedule and its own inspections and oversight to ensure an enforceable undertaking is meeting its targets and objectives.

7. Completing the enforceable undertaking

Once the enforceable undertaking is completed, the duty holder must submit a final compliance report.

Maritime NZ will confirm, to its satisfaction, whether or not the enforceable undertaking has been met. This could involve a number of activities, including (but not limited to):

- reviewing the final report and considering it against the monitoring schedule
- contacting victim(s) and other interested parties as detailed in the undertaking, and
- Maritime NZ inspections.

If Maritime NZ deems the undertaking to be met, it will:

- confirm in writing to the duty holder that the enforceable undertaking is complete and that it will be discharged
- notify the victim(s) of the completion of the enforceable undertaking, and
- update the register.

Non-completion, variations and withdrawals

What happens if an enforceable undertaking is not complied with?

Failing to comply with an enforceable undertaking is an offence under section 126 of HSWA.

If Maritime NZ believes a duty holder has not complied with any aspect of an enforceable undertaking, it may investigate and pursue enforcement action in relation to it. If the terms of an enforceable undertaking have been breached, the Court has a number of options available to it. These are detailed in Section 127 of HSWA.

If an enforceable undertaking is contravened Maritime NZ may also bring proceedings for the contravention of the safety legislation the enforceable undertaking relates to.

What are Maritime NZ's processes for variations and withdrawals of an accepted enforceable undertaking?

Withdrawal of the enforceable undertaking

Section 128 of HSWA provides that a duty holder who has an enforceable undertaking may at any time, with the written agreement of Maritime NZ, withdraw the undertaking or vary the agreement.

Requests for withdrawal of an enforceable undertaking must be made in writing to the EU Team.

If Maritime NZ consents to a withdrawal, the duty holder will no longer be bound by the terms of the enforceable undertaking. Withdrawal will only be considered in exceptional circumstances.

Maritime NZ will seek the views of the victim(s) for any request to withdraw an application. Views of victim(s) are important and will be actively considered as part of our decision-making process.

If Maritime NZ has consented to a withdrawal, it may take legal action in relation to the original offence or alleged offence that the enforceable undertaking relates to.

If Maritime NZ consents to the withdrawal it will:

- advise the duty holder in writing of the decision and reasons for the decision
- notify victim(s) of the decision and reasons for the decision, and
- publish the decision to withdraw an enforceable undertaking.

If Maritime NZ declines the withdrawal request, it will:

- advise the duty holder in writing of the decision and reasons for the decision, and
- continue to monitor delivery of the enforceable undertaking as per the monitoring schedule.

If a request to withdraw an undertaking is declined, the duty holder will be required to continue delivering the enforceable undertaking as originally accepted by Maritime NZ. If the duty holder does not continue to comply with the enforceable undertaking, Maritime NZ may pursue enforcement action.

Variation of the enforceable undertaking

Requests for variation of an enforceable undertaking must be made in writing to the EU Team.

Maritime NZ will seek the views of the victim(s) for any request to vary an application. Views of victim(s) are important and will be actively considered as part of our decision-making process.

Maritime NZ will only consider variations:

- that do not alter the spirit of the original undertaking, and
- where there has been a material change in the duty holder's circumstances, and/or
- if compliance with the terms of the undertaking is later found to be impractical or can be achieved through other means.

Section 128 of HSWA states that an enforceable undertaking cannot be varied to provide for a different contravention.

If Maritime NZ agrees to vary an enforceable undertaking, it will:

- advise the duty holder in writing of the decision and reasons for the decision
- review the monitoring schedule and update as required to reflect the variation
- notify victim(s) of the decision and reasons for the decision, and
- publish the decision to vary the enforceable undertaking.

If Maritime NZ declines the request to vary an enforceable undertaking, it will:

- advise the duty holder in writing of the decision and reasons for the decision
- continue to monitor delivery of the enforceable undertaking as per the monitoring schedule.

If a request to vary an undertaking is declined, the duty holder will be required to continue delivering the enforceable undertaking as originally accepted by Maritime NZ.

What costs will be recovered by Maritime NZ in an enforceable undertaking?

No fee or charge applies to an application for an EU or where an Undertaking has been accepted.

Maritime NZ is currently reviewing its approach to cost recovery for Enforceable Undertakings.

Definitions

The following terms are used in reference to enforceable undertakings:

Compliance intervention panel (CIP)	The compliance intervention panel (CIP) is a cross-organisation panel that meets periodically to consider how best to respond to compliance issues that arise.
Contravention	An action which offends against the Health and Safety at Work Act 2015 and/or any Regulations made under it. It includes both health and safety contraventions. For the purposes of this policy, a contravention also includes an alleged contravention.
Decision Maker	The person who receives advice from the Maritime NZ Enforceable Undertaking Review Panel and makes the interim and final decision about whether or not to accept a proposed enforceable undertaking. This is the Deputy Director, Compliance Systems Delivery. The Decision Maker can, at their discretion, defer decision-making on any given enforceable undertaking to the Maritime NZ Executive Leadership Team or a sub-group of that Team.
Duty Holder	The duty holder who proposes an enforceable undertaking and against whom the proposed enforceable undertaking becomes an accepted enforceable undertaking (if accepted). The term includes a reference to bodies corporate, the crown and a public authority.
Enforceable Undertaking	An enforcement pathway that allows a duty holder to voluntarily enter into a binding agreement with Maritime NZ. It generally used as an alternative to prosecution. The agreement outlines actions the duty holder will undertake to address the contravention. It is expected to deliver activities which benefit workers, the wider industry or sector and/or the community as well as acceptable amends to any victim(s).
Fatal Illness	One that causes, or will cause, the death of an individual.
Fatal Injury	One that causes the death of an individual.
HSWA	Health and Safety at Work Act 2015.
Suitability Assessment	An assessment to determine whether an enforceable undertaking is a suitable enforcement outcome given the specific circumstances of a contravention.
Maritime NZ Enforceable Undertaking Team (EU Team)	A team within Maritime NZ whose function is to: <ul style="list-style-type: none"> ○ administer the enforceable undertaking process ○ provide an advisory function to the sector and within Maritime NZ, and ○ monitor all accepted enforceable undertakings. <p>The team is also responsible for applying the suitability assessment.</p>
Maritime NZ Enforceable Undertaking Review Panel (EU Panel)	A group that considers enforceable undertaking applications and makes recommendations to the Decision Maker about whether the proposal should be accepted or not. It is made up of three representatives, one each from: <ul style="list-style-type: none"> • Investigations and Planning • Organisational Strategy and Systems • Certification
Vulnerable Victim	Someone who has little control over their situation and may be more easily harmed, affected or hurt. Examples of vulnerable people include, children; members of the public; young or elderly workers; pregnant or breast-feeding mothers or migrant workers.