

Enforceable Undertakings

Practice guide



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Enforceable Undertakings Practice Guide

Part 4, Health and Safety at Work Act 2015

Enforceable undertakings are an alternative to prosecution when a duty holder has breached (or is alleged to have breached) the Health and Safety at Work Act 2015 (HSWA).

It is a way for a duty holder to voluntarily make a binding agreement with Maritime New Zealand to take actions in response to the breach they have made. The enforceable undertaking process provides an opportunity for the duty holder to take steps to address and respond to the specific breach, and also to commit to undertaking measures to improve health and safety in the workplace and across the industry, and to remedy any harm to victim(s) by providing appropriate amends. If an enforceable undertaking is entered into between a duty holder and Maritime NZ, the relevant prosecution proceedings will be withdrawn.

This document provides additional information on the process and should be read in conjunction with the *Enforceable Undertakings Operational Policy*.

1. Registering interest

Any duty holder seeking to enter into an enforceable undertaking must first express their interest to Maritime NZ before an application is submitted. This expression of interest must be made to the Director of Maritime NZ, by sending an email to the Enforceable Undertakings Team (the EU Team) via the enforceable undertakings email address:

EnforceableUndertakings@Maritimenz.govt.nz

An expression of interest can be submitted at any time following the breach (including an alleged breach), but will not be considered until after the investigation is complete. Maritime NZ will continue with legal proceedings as an independent but parallel process. The expression of interest is non-binding on both Maritime NZ and the party expressing interest in an enforceable undertaking. The registration of interest must clearly state:

- who the duty holder is that has an interest in applying for an enforceable undertaking;
- an explanation of the breach of duty, incident or event, that has occurred (**breach**); and
- that the duty holder intends to make an application for an enforceable undertaking in relation to the breach.

The EU Team will acknowledge all expressions of interest by email within 3 business days.

It is important to note that even if a duty holder expresses interest in possibly pursuing an enforceable undertaking:

- The enforceable undertaking process set out in this Practice Guide will not begin until the investigation into the breach is complete. Any legal proceedings Maritime NZ has initiated for the contravention will continue until the outcome of the application is finalised. The purpose of the investigation is to ascertain the nature and circumstances of any breach of duty. The evidence that is gathered during the investigation will be relevant to Maritime NZ's section 47 review and suitability assessment, and to the assessment of any application for an enforceable undertaking subsequently submitted. An applicant for an enforceable undertaking should be aware that it can take up to 12 months from the date of a breach to complete an investigation and file any charges in court; and
- If Maritime NZ files charges in relation to the breach, those proceedings will continue until the outcome of any enforceable undertaking application is finalised.

2. Section 47 review

Once the investigation is complete, and a duty holder has registered an expression of interest in an enforceable undertaking, Maritime NZ will conduct a legal review of the file to consider whether we believe the breach amounts to an offence under section 47 of the HSWA.

Section 47 is an offence of reckless conduct in respect of a duty that exposes an individual to a risk of serious injury, serious illness or death. This is the most serious offence under the HSWA and the maximum penalties include imprisonment.

Maritime NZ cannot accept an enforceable undertaking if we believe that the breach amounts to an offence against section 47 of the HSWA.

The EU Team will advise the duty holder in writing via the enforceable undertakings email if Maritime NZ decides that the breach amounts to a section 47 offence.

The EU Team will not contact the duty holder if the breach does not amount to a section 47 offence. Instead, the EU team will proceed directly to the next stage of the process, the suitability assessment (discussed below).

3. The suitability assessment

The EU Team will apply the suitability assessment to any expression of interest once the section 47 review is complete and Maritime NZ has concluded that it does not believe a section 47 offence has been committed. At this stage, the EU Team considers whether an enforceable undertaking is a suitable outcome, given the nature and specific circumstances of a breach, as well as any relevant past conduct of the duty holder, and key public interest factors.

The EU Team will consider the breach against a number of measures. It is unlikely that an enforceable undertaking will be accepted for any breach that meets two or more of the following measures:

Did the breach result in a fatal or serious injury or illness?

A fatal injury is one that causes the death of an individual. A fatal illness is one that causes, or will cause, the death of an individual.

Did the breach involve a vulnerable victim(s)?

Where the breach has harmed a vulnerable person (or people) or put them at risk. A vulnerable person is someone who has little control over their situation and may be more easily harmed, affected or hurt. Examples of vulnerable people are children; members of the public; young or elderly workers; pregnant or breastfeeding mothers and migrant workers.

Was there the potential for the breach to result in fatalities or serious injury (including to multiple persons)?

The breach had the potential to have fatal or serious health and safety consequences for multiple people and may even have had the potential to affect people beyond the workplace boundary.

Does the breach involve a high level of culpability on the part of the duty holder?

Factors to be taken into account under this heading include:

- The nature of the acts or omissions engaged in by the duty holder (in particular, the practicable steps that it was reasonable for the duty holder to have taken);
- The degree of departure from prevailing standards in the sector or industry that the breach involved;
- The obviousness of the hazard;
- What the duty holder knows, or ought reasonably to know, about the hazard or risk and the

ways of eliminating or minimising the risk; and

- The cost associated with available ways of eliminating or minimising the risk, including whether the cost would have been grossly disproportionate to the risk.

Does the breach demonstrate repeat conduct by the duty holder?

Records and/or evidence indicate that the duty holder has a history of:

- Engaging in conduct that has caused related or similar harm; and/or
- Non-compliance leading to formal (statutory) enforcement (for example, previous convictions, warnings, notices) that is recent, relevant and/or significant.

Is an enforceable undertaking likely to be challenged by victim(s) (or their representative), union or employer organisation?

The victim(s), union or employer organisation has demonstrated a strong view with reasons against an enforceable undertaking.

Would accepting an enforceable undertaking be contrary to a stated government priority or policy?

This includes the Letter of Expectations from the Minister for Workplace Relations and Safety, and Maritime NZ's Statement of Intent and our Strategic Framework

After the EU Team has applied the suitability assessment and determined that a breach may be suitable for an enforceable undertaking, it will advise the duty holder in writing, via the enforceable undertakings email, that Maritime NZ is ready to consider an application. Even if Maritime NZ determines that a breach may be suitable for an enforceable undertaking, this does not guarantee that an application for an enforceable undertaking will be granted.

If the EU Team has determined that the breach meets two or more of the measures, they will also advise the duty holder in writing that it is unlikely an enforceable undertaking will be accepted. They will also tell the duty holder which measures were deemed to have applied, and explain why those measures were considered to apply.

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

4. Submitting an application

Duty holders must submit their application on the enforceable undertakings application form, together with any supporting evidence and documentation (for example, information relating to the proposed initiatives, communications with union representatives and/or the victim(s), information about the duty holder's financial circumstances). The application must be sent to the EU Team via the enforceable undertakings email. There is no application fee.

An application for an enforceable undertaking will not be considered before the investigation of the breach has been completed and charges have been filed. As set out above, generally an investigation into a breach and the commencement of any legal proceedings will take up to 12 months from the date of the breach.

By accepting an application for consideration, Maritime NZ is not committing to enter into an enforceable undertaking.

The EU Team will provide written acknowledgement by email that they have received an application within 3 business days.

All applications for an enforceable undertaking must:

- Set out the circumstances of the incident / breach.
- Acknowledge the underlying conduct or failures that have given rise to the breach. Under section 123(3) of the HSWA, the giving of an enforceable undertaking does not constitute an admission of guilt to the breach to which the undertaking relates. However, an application for an enforceable undertaking will not be accepted if the application does not include an acknowledgement of the underlying conduct or failures that have resulted in the breach.
- Address the steps undertaken, or that are planned, to respond to the breach and to ensure no similar breach will occur in the future (for example, via the implementation of health and safety procedures, policies and standards, or from reviews or audits of procedures or policies, compliance assessments and third party assessment). If any steps are planned, there should include an explanation of when that planned response will come into effect, and why it has not been done at the time of submitting the enforceable undertaking application.

5. Considering the Application

Detail any commitments proposed by the duty holder that would make a significant contribution to promoting higher standards of work health and safety in the given sector or industry. These commitments do not need to relate to the specific circumstances which led to the breach, but may also aim to address and improve work health and safety generally in the relevant workplace and in the wider industry. Proposals are not limited to financial initiatives/funding, and may also

include other kinds of contributions and measures that provide a benefit. The commitments could be for the benefit of one or more of the following groups:

- the workers and/or work and/or workplace;
 - the wider industry or sector;
 - the community.
- Outline and acknowledge the benefits that the duty holder will receive if the prosecution does not proceed, and the implications for the duty holder as a result. This includes avoiding a conviction and other sentencing outcomes (such as a fine and orders for reparation).
 - Outline whether the duty holder has consulted with any applicable union and within their sector / industry about the proposed measures, the nature and scope of this consultation, and what feedback was received on the proposed measures. This should include supporting documentation or other evidence, such as letters of support).
 - Detail appropriate amends and support for any victim(s) (monetary or otherwise). This includes support/amends already made (and evidence of that), as well as any further amends proposed as part of the enforceable undertaking.

Detail whether the duty holder has engaged with the victim(s) about the proposed measures, the nature and scope of this engagement, and what feedback was received (including providing any supporting evidence from the victim(s) detailing this feedback, such as letters in support). Examples of measures that may benefit the groups referred to above include (but are not limited to) the following:

- Conducting, facilitating or funding research into a safety issue relevant to the industry (for example, relating to safety management systems, safety equipment or worker health).
- Developing or funding the creation of databases or information systems to enable the monitoring of safety issues in the industry and to promote the reporting of issues.
- Implementing specified projects, such as developing and/or presenting specialised training programmes, seminars, forums or conferences, to address particular needs of workers, supervisors and management and/or for the wider industry.
- Promotion and education campaigns.
- Employing and/or funding work health and safety expertise within the workplace and/or

industry sector and taking other steps to promote a safety culture within the workplace and/or industry sector.

- Community service commitments and contributions, such as implementation of an industry-wide awareness programme or publication of educational or training materials and resources.
- Donating funds to or sponsoring a not-for-profit organisation with a specific focus on work health and safety, including short, medium and long term objectives assisting in, or funding, the development of industry standards relevant to the duty holder's industry.
- Funding tertiary scholarships for work health and safety students in consultation with relevant universities, providing work experience or internship programmes for students, or developing a work and safety programme for students.

The duty holder should provide detailed information (and any relevant supporting documents and evidence) about the nature of any proposed measure, the steps that will need to be undertaken to complete the measure, the benefit(s) that the measure will create (including which individuals and groups the measure will benefit and why), and the proposed timeframe for implementing the measure. This includes detailing any consultation that has taken (or will take) place with any applicable union and/or victim(s) regarding any proposed measure, and the feedback received.

Irrespective of having received an expression of interest or an application for an enforceable undertaking, Maritime NZ will continue with its process, including the enforcement decision-making process and/or any legal proceedings independently, but in parallel. As referred to above, an expression of interest or application for an enforceable undertaking will not be assessed by Maritime NZ until the investigation process is complete or significantly progressed (which can take up to 12 months from the date of the breach). Any expressions of interest or applications received before this time will not be assessed and considered until after the investigation has concluded or been significantly progressed, and a suitability assessment has been completed and notified to the parties.

Maritime NZ will endeavour to determine any application before the 12-month time-frame for filing charges, but if this is not possible we may proceed with filing charge(s). Any decision to withdraw charges will be made when a decision is made on the enforceable undertaking application.

Maritime NZ will take all reasonable steps to adjourn any court proceedings until such time as a decision has been made on the application. However, adjournments will only be sought or consented to where there is a genuine commitment to entering into an enforceable undertaking. Adjournments will not be sought or agreed to where an application for an enforceable undertaking is being used as a delay tactic.

5. Considering an application

The threshold for accepting a proposed enforceable undertaking is a high one.

The Enforceable Undertakings Panel will consider the application and make a recommendation to the EU Team about it. An application (and any supporting evidence and documentation filed with it) must demonstrate that the proposed enforceable undertaking constitutes a proportionate enforcement

outcome. The proposed enforceable undertaking will be considered using the factors set out below.

The nature of the proposals in the application and the benefits that would be realised to the health and safety system from them

This includes (but is not limited to) -

- The value proposition of the application, that is, the value or benefit that Maritime NZ discerns will be delivered through the proposed enforceable undertaking.
- How the proposed actions will promote progressively higher standards of work health and safety. This means commitments that would “raise the bar” or promote progressively higher standards of work health and safety in the given sector or industry.
- Considering which groups will realise the benefits of the proposed actions.

The nature of the duty holder’s breach and how serious it was

This includes (but is not limited to) -

- The significance and seriousness of the breach (in particular whether it is of a nature that requires the transparency of a court hearing, in the public interest).
- The injuries, and/or risk of injury or illness, as a result of the breach.
- The duty holder’s culpability (including with reference to the factors referred to above under the suitability assessment).

Information received from any interested party in relation to the application

This includes (but is not limited to) -

- Information about the incident, views on health and safety management at the workplace, the victim(s) recovery from the injury and their likely future work prospects.
- Whether any offer of amends has been made, or paid, in relation to the harm suffered and the victim(s) views about the adequacy of that offer.
- Whether any offer has been made for the victim(s) to participate in a restorative justice type process, and their views about this.
- Input from worker representatives (Health and Safety Representatives and unions) if applicable.
- The victim(s) views as to whether an enforceable undertaking would be an acceptable alternative to other enforcement alternatives.

While they do not have a right of ‘veto’, the views of the victim(s) are important and will be actively considered. In addition to considering the victim(s)’ views, Maritime NZ will also consider the adequacy of the proposed victim compensation against reparation orders that would be made by a court in similar circumstances.

Mitigation and remedial action already taken, or planned, by the duty holder regarding both the breach and any person affected by it (including victims)

This includes (but is not limited to) -

- Steps taken by the duty holder to ensure a further breach does not occur in future (including steps which go beyond achieving compliance with the HSWA and other applicable legislation).
- Commitment that the behaviour that led to the breach has ceased and will not reoccur.
- Commitment to the ongoing effective management of work health and safety risks.
- Commitment to disseminate information about the circumstances of the breach and/or the enforceable undertaking to workers and other relevant parties (for example, the wider industry).
- Financial payments made to the victim(s).
- Other help or support provided to the victim(s).
- Information regarding any rehabilitation programmes, and the victim(s) quality of life since the incident, where relevant.
- Information regarding retraining of the victim(s), where relevant.
- Actions taken to address any deficiencies in health and safety management in relation to the breach.

The duty holder's past performance and history of compliance with health and safety legislation

This includes (but is not limited to) -

- The duty holder's safety record.
- Any aggravating circumstances which exist (e.g. previous knowledge about the hazard or risk relating to the subsequent breach).
- Whether Maritime NZ is satisfied with the prospects for ongoing compliance based on the duty holder's past conduct and behaviour.

Any likely outcome if the matter were dealt with by legal proceedings

This includes (but is not limited to) whether the application has accounted for the benefits that accrue to the duty holder by the prosecution not proceeding. This includes avoiding:

- A conviction being recorded against the duty holder.
- Any possible fine that may have been imposed.
- Any other costs that may have been awarded to Maritime NZ.
- Any other sentencing option, such as reparation or project order.

Any other matter which Maritime NZ thinks relevant

In addition to the above factors, Maritime NZ will take into account any other factor which it considers relevant, such as public interest factors. Factors that may be taken into account include (but are not limited to) -

- Whether there has been a commitment to participate constructively in all compliance monitoring activities of the undertaking.
- Whether there has been a commitment from management to improving the health and safety culture within the business. This can include, but is not limited to:
 - Defining health and safety responsibilities.
 - Sharing the health and safety vision across the organisation.
 - Creating an environment that holds everyone accountable for being visibly involved, especially managers and supervisors.
 - Improving worker participation within the organisation.
 - Encouraging incident reporting.
 - Creating and/or evaluating an incident investigation system to make sure investigations are conducted in an effective manner.
- Whether there has been a commitment to put in place management strategies that will ensure the on-going effective management of risks to health and safety in the future. This can include, but is not limited to:
 - Procedures, policies and standards.
 - Assessment of health and safety performance, including reviews of procedures or policies, compliance assessments and third party assessment.

In addition, and among other considerations, Maritime NZ will not accept a proposed enforceable undertaking where it:

- Contains a denial of responsibility for the breach.

- Does not contain a statement acknowledging that harm was caused or risked by the breach.
- Contains any clause which could be relied on to avoid compliance with the enforceable undertaking.
- Omits to include, or downplays, 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.

Consideration

Taking into account the above factors, the Enforceable Undertakings Panel will recommend an application should be accepted or declined. A decision is then made by the Deputy Director, Compliance Systems Delivery.

The Enforceable Undertakings Panel can choose to refer the application back to the duty holder with feedback and a request that they re-submit the application. However, this is not mandatory and is completely at Maritime NZ's discretion. The duty holder should submit their best application the first time, including providing detailed proposals regarding commitments and supporting evidence for the information set out in the application.

The EU Team will advise the duty holder in writing about Maritime NZ's decision via the enforceable undertakings email. This will include the reasons for the decision.

If the decision is to decline an application, the duty holder will be provided with the preliminary decision and have an opportunity to make a submission to Maritime NZ. This submission must be made in writing via the enforceable undertakings email and should only address the reasons given by Maritime NZ for the decision. Any new or different terms proposed by the duty holder in the submission, or a new application, will not be considered. Maritime NZ will then fully consider the relevant issues raised by the applicant and make a final decision whether or not to accept or decline the enforceable undertaking.

If Maritime NZ accepts an application, then any legal proceedings taken against the duty holder will be discontinued as soon as practicable. If the application is declined, then legal proceedings will be commenced.

Maritime NZ expects the duty holder to co-develop and agree a communications protocol. This includes agreeing to a joint public statement to be released immediately following the acceptance of an enforceable undertaking summarising the actions set out in the undertaking. Maritime NZ is required to publish the decision to enter into the enforceable undertaking and the reasons on its website under section 124 of the HSWA. Where the undertaking is to be published in full on the Maritime NZ website, Maritime NZ will consult with all affected parties, including any victims and the duty holder, on appropriate redactions to protect personal or commercially sensitive information contained in the undertaking.

Further information about the decision-making process is provided in the Enforceable Undertakings Operational Policy.

Costs

MNZ will not charge fees or costs regarding an application for an enforceable undertaking or where an undertaking has been accepted.

6. Monitoring the enforceable undertaking

Monitoring

Once an enforceable undertaking is accepted, the EU Team will set up a monitoring schedule. This will include an agreed timeframe for completion of the enforceable undertaking.

The purpose of the monitoring schedule is to ensure the duty holder is meeting the agreed targets and objectives in the enforceable undertaking. It enables Maritime NZ to make an independent assessment of compliance against the key milestones throughout the life of the undertaking.

All proposed enforceable undertakings will be monitored by the EU Team. The duty holder will be responsible for satisfying Maritime NZ that they are fulfilling the terms of the agreement by providing timely reports and other evidence. Maritime NZ may also include its own inspections and oversight in a schedule.

Monitoring schedules and timeframes will be set on a case-by-case basis based on the specific circumstances of, and actions detailed in, an enforceable undertaking.

Maritime NZ may revise the monitoring schedule during the term of the undertaking if it receives information that would indicate different, or additional, compliance monitoring is appropriate. For example, in situations where there are further notifiable events or where routine inspections or assessments raise issues. If this occurs, Maritime NZ will advise the duty holder in writing via the enforceable undertakings email.

Further information about monitoring is provided in the *Enforceable Undertakings Operational Policy*.

Non-Compliance

Enforceable undertakings are legally binding. Failing to comply with an undertaking is an offence under section 126 of the HSWA.

If the EU Team believes an enforceable undertaking has not been complied with, Maritime NZ may investigate further. This may result in enforcement action.

Details about what could happen if court action is taken can be found in section 152 of the HSWA and in the *Enforceable Undertakings Operational Policy*.

If a duty holder breaches the terms of the enforceable undertaking, Maritime NZ can choose to initiate legal proceedings for the original breach as well as for the breach of the undertaking.

Variation

The duty holder can apply to vary the terms of an approved enforceable undertaking. The application must be made in writing via the enforceable undertakings email.

The decision about whether to vary an enforceable undertaking sits with Maritime NZ. Maritime NZ is not obligated to accept a variation request and will consider each on its merits. 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 has been later found to be impractical.

Maritime NZ cannot vary an enforceable undertaking to reflect a separate breach of the Act (should one later occur or come to light). This is prohibited by section 128 of the HSWA.

In such circumstances, it is very unlikely that a separate enforceable undertaking would be accepted for the subsequent breach.

Should a request to vary an enforceable undertaking be received, Maritime NZ will contact the victim(s) and their views will be actively considered.

Further information is provided in the *Enforceable Undertakings Operational Policy*.

Withdrawal

The duty holder can apply to withdraw from an enforceable undertaking before its completion. The application must be made in writing via the enforceable undertakings email.

Maritime NZ is under no obligation to accept such requests, and will consider each on its merits.

Withdrawal will only be considered in exceptional circumstances. Where a withdrawal is agreed to, the person will no longer be bound by the terms of the enforceable undertaking and Maritime NZ may decide to take legal action in relation to the original breach.

Further information is provided in the *Enforceable Undertakings Operational Policy*.

Should a request to withdraw from an enforceable undertaking be received, Maritime NZ will contact the victim(s) and their views will be actively considered.

7. Completion of the enforceable undertaking

The EU Team will decide when an enforceable undertaking is completed. This will be when they are satisfied that all of the agreed actions in the undertaking have been complied with and carried out.

The EU Team will advise the duty holder in writing via the enforceable undertakings email that the enforceable undertaking has been successfully completed