ENFORCEABLE UNDERTAKINGS

Under the *Work Health and Safety Act 2012* (SA) (the WHS Act), SafeWork SA may accept an enforceable undertaking from a person in connection with any contravention or alleged contravention of the Act as an alternative to proceeding to prosecution.

WHO SHOULD READ THIS?
This fact sheet should be read by a person conducting a business or undertaking (PCBU).

WHAT IS AN ENFORCEABLE UNDERTAKING?
Enforceable undertakings are new to South Australia and under certain circumstances provide an alternative to prosecutions, avoiding the cost of litigation to both the public and to individual businesses.

Part 11 of the WHS Act sets out provisions relating to enforceable undertakings. It allows for SafeWork SA, as the regulator, to accept a written, enforceable undertaking (a WHS undertaking) from a person in connection with a matter related to a contravention or an alleged contravention of the Act, as an alternative to proceeding to prosecution.

A WHS undertaking is a legally binding agreement in which a person or organisation agrees to carry out specific activities to rectify a contravention or alleged contravention of the WHS Act or to improve worker health and safety performance.

The giving of a WHS undertaking does not constitute an admission of guilt.

SAFEWORK SA MAY ACCEPT WHS UNDERTAKINGS
SafeWork SA has the discretion to accept or reject a WHS undertaking by a person in connection with a matter relating to a contravention or alleged contravention of the WHS Act, with the exception of a Category 1 offence.

NOTICE OF DECISION AND REASONS FOR DECISION
SafeWork SA must provide written notice of its decision to accept or reject the WHS undertaking, as well as reasons for that decision.

Where SafeWork SA accepts a WHS undertaking, notice of this decision and the reasons for it must be published on the SafeWork SA website. This will assist individuals and business to understand the factors that will be taken into account when deciding whether to accept or reject a request for a WHS undertaking.

If SafeWork SA rejects a WHS undertaking, the decision is final.

WHEN A WHS UNDERTAKING IS ENFORCEABLE
A WHS undertaking takes effect and becomes enforceable when SafeWork SA’s decision to accept the undertaking is provided to the person who made the undertaking or at any later date specified by SafeWork SA.

---

1 A Category 1 offence, as defined in clause 31 of the WHS Act, is the most serious work, health and safety offence and involves reckless conduct by a duty holder that exposes an individual to a risk of death or serious illness or injury without reasonable excuse.
COMPLIANCE WITH A WHS UNDERTAKING

It is an offence for a person to contravene a WHS undertaking.

The following penalties apply for a breach of a WHS undertaking:

- in the case of an individual a maximum penalty of $50,000; and
- in the case of a body corporate a maximum penalty of $250,000.

SafeWork SA may apply to the Magistrates Court (as constituted by an Industrial Magistrate) for an order if a person contravenes a WHS undertaking. If the court is satisfied that a contravention has occurred, the court, in addition to imposing a penalty, may also:

- make an order directing the person to comply with the undertaking; and/or
- make an order discharging the undertaking; and/or
- make any other order it considers appropriate in the circumstances, including orders that the person pay the costs of proceedings and pay SafeWork SA’s (reasonable) costs in monitoring compliance with the WHS undertaking in the future.

An application for, or the making of, any orders by the Magistrates Court in the case of a breach of a WHS undertaking will not prevent proceedings being brought for the original contravention or alleged contravention in relation to which the WHS undertaking was made.

WITHDRAWAL OR VARIATION OF WHS UNDERTAKING

A person who has made a WHS undertaking may withdraw or vary the undertaking with the written agreement of SafeWork SA. However, an undertaking cannot be varied to provide for a different alleged breach of the Act. This would require a separate undertaking.

Notice of any withdrawal or variation will be published on SafeWork SA’s website.

PROCEEDINGS FOR ALLEGED CONTRAVENTION

If a WHS undertaking is in effect, or has been completely discharged, a person cannot be prosecuted for a contravention or alleged contravention of the WHS Act to which the WHS undertaking relates.

SafeWork SA may accept a WHS undertaking while related court proceedings are underway, but before they have been finalised. In such circumstances, SafeWork SA will take all reasonable steps to discontinue the proceedings as soon as possible.

YOUR OBLIGATIONS

A WHS undertaking is voluntary. Therefore, you cannot be compelled to make an undertaking.

Important

This information provides guidance on work health and safety matters. It may refer to legislation that has been amended or repealed and should not be taken as a statement of law. To ensure compliance with your legal obligations, you should always refer to the current Work Health and Safety Act and Regulations.

Note: Sub-clause 232(1)(c) of the WHS Act provides that if a WHS undertaking has been given in relation to a contravention or alleged contravention of the Act then the applicable time limit for bringing a proceeding is within 6 months after (i) the WHS undertaking is contravened; or (ii) it comes to the notice of the regulator that the WHS undertaking has been contravened; or (iii) the regulator has agreed under clause 221 to the withdrawal of the WHS undertaking.