

Enforcement Group

Policy on Enforceable Undertakings pursuant to section 16 of
the *Occupational Health and Safety Act 2004*

October 2014

Victorian WorkCover Authority

Enforceable Undertakings

1. SCOPE

This policy sets out the Victorian WorkCover Authority's (VWA) processes and criteria for considering an offer of an Enforceable Undertaking (EU) from a person who has allegedly committed an offence against the Occupational Health and Safety Act (2004) (the Act).

VWA's General Prosecution Guidelines ("the Guidelines") are published in the Government Gazette and on www.vwa.vic.gov.au. The Guidelines set out the criteria for, and approach to, prosecution decisions. They guide the VWA on the exercise of its prosecutorial discretion.

This policy is consistent with, and supports the Guidelines and the Act.

This policy in no way replaces or adds to any of the principles set out in the Guidelines and the Act.

This policy should be read in the context of, and subject to, the Guidelines.

This policy will be kept under regular review and may be modified by the VWA at any time.

All prosecution-related activities are conducted by the VWA's Enforcement Group.

2. BACKGROUND

In the event of a contravention against the Act, the VWA may accept an EU given in writing by a person who allegedly committed the contravention pursuant to section 16 of the Act ("the applicant").

An EU is a written undertaking which contains commitments by the applicant to do certain things within a particular timeframe. The acceptance of an EU by the VWA is an alternative to prosecution of the applicant in respect of the particular contravention.

An EU does not constitute an admission or a finding of guilt. Where a charge or charges have already been laid against the applicant in respect of the contravention, such charges are withdrawn by the VWA upon acceptance of the EU.

An EU is enforceable against the applicant who has committed to the EU and the VWA will seek to enforce an EU against the applicant in the event that there is a failure to comply with its terms (section 17 of the Act)

An EU that has already been accepted from an applicant can be varied, but only by agreement with the VWA.

3. WHO CAN ACCEPT OR REJECT AN EU

The decision to accept or reject an EU can only be made by the VWA. An EU can only be accepted or rejected by a person with the power of the VWA under section 17 of the Act, which has been delegated by the Chief Executive.

4. NATURAL JUSTICE / PROCEDURAL FAIRNESS

An applicant will be provided a reasonable opportunity to make submissions as to any matter that the VWA wishes to properly take into account in making its decision and anything upon which the decision may be based.

The opportunity to make a submission in response to the VWA's concerns regarding an EU will be afforded to the applicant at appropriate stages as outlined by this policy.

The applicant may choose to withdraw its offer of an EU at any stage prior to acceptance by the VWA.

5. STAGE WHEN AN EU CAN BE PROPOSED

Pre-charge

An EU may be offered to the VWA prior to any charges being laid. The opportunity to do so will arise where a comprehensive investigation into an alleged contravention has concluded and the VWA has formed a view that there is sufficient evidence to support an offence under the Act.

The VWA will not consider an EU prior to the completion of a comprehensive investigation.

Post-charge

An EU is most commonly offered following the commencement of proceedings against a person in respect of a contravention, after the brief of evidence has been served.

An EU offered by an applicant to the VWA at a stage where proceedings have been listed by a court for a contested court hearing or a plea of guilty is less likely to be accepted.

Proceedings already committed to trial are conducted by the Director of Public Prosecutions to whom this policy does not apply.

6. GENERAL EXCLUSIONS – PRELIMINARY

As a starting point, EUs will usually not be appropriate where any of the following circumstances exist:

Fatalities/Reckless conduct

The contravention is connected to the death of a person, whether or not the contravention can be said to have directly caused the death.

The contravention involves reckless endangerment, being an alleged contravention against section 32 of the Act.

Recent Criminal history

The applicant has a recent prior conviction or finding of guilt against the Act which was connected to the death of a person, whether or not the prior matter is said to have directly caused the death, unless the prior matter was more than 5 years prior to the contravention the subject of the proposed EU.

The applicant has more than two recent prior convictions or findings of guilt against the Act arising from separate investigations, unless the last prior matter concluded more than 5 years prior to the contravention the subject of the proposed EU.

Preliminary Process for matters in General Exclusion

The intention of this process is to save the applicant from unnecessary investment into an EU proposal which falls into one of the exclusion areas and therefore could be rejected at the outset without proceeding to the EU Evaluation Panel.

If a proposed EU or applicant falls into any of the categories of general exclusion, the applicant will be informed in writing of the relevant category of general exclusion applicable to the EU, and provided the opportunity to address those issues. The applicant's submission should identify any exceptional circumstances which exist that demonstrate that an EU would be more appropriate than the VWA pursuing a prosecution.

If the VWA decides to reject the proposed EU on the basis of the categories of general exclusion, the applicant will be provided a Notice of Decision with reasons.

The VWA may decide not to reject the applicant at the outset after consideration of an applicant's submission, and the EU Evaluation Process will continue.

7. RECEIPT OF AN EU OFFER PRIOR TO CHARGES BEING LAID

The brief of evidence in relation to a contravention will be assessed by the VWA as to whether there is sufficient evidence to support an offence under the Act or Regulations. An EU will not be considered until such time as that determination has been made.

If there is not sufficient evidence to support an offence, the matter ends.

If there is sufficient evidence to support an offence, an EU may be considered. The lawyer will follow the EU evaluation process in the same way as though charges have been laid.

VWA may still choose to lay charges in respect of the alleged contravention while the EU process continues.

EU EVALUATION PROCESS

8. GENERAL

The Enforcement Group will not provide the applicant an opinion about whether or not an EU will be accepted by the VWA. All EU offers will be considered.

The evaluation criteria used by the VWA is provided in this policy.

The applicant should refer to the VWA website and particular to the EUs which have been previously accepted as a guide. A template EU is also available as a starting point.

Timeline

A lawyer from the Enforcement Group will have preliminary discussions with the applicant (or their legal representative) in relation to the EU process and timeline so that an adjournment of any court date can be arranged.

Where prosecution proceedings are on foot, the Court will be advised that the applicant is offering or has offered the VWA an EU which will require consultation and evaluation. A longer than usual adjournment of proceedings and further adjournments may be required.

Review of basic content of EU

The Enforcement Group will review the basic content of the EU for issues which can affect its enforceability and may return it to applicant for re-submission if necessary.

This list is not exhaustive but the applicant should ensure that:

- The applicant has been correctly identified;
- The alleged contraventions have been correctly described on a factual basis;
- No persons other than the applicant are identified;
- The EU has an end date or period within which the undertakings must be completed;
- The EU has a provision or provisions which enable the VWA to monitor that the undertakings are progressing and ultimately completed, such as timeframes for delivery of reports or other evidence of completion to the VWA.
- The EU does not contain any terms which provide the applicant excuses or defences for the non-performance of undertakings within the EU;
- The EU does not contain any terms which seek to limit the VWA's power in relation to any future contraventions or attendances on the applicant;
- The EU does not contain undertakings which rely on the cooperation or involvement of a third party, unless there is written consent of the third party;
- The EU does not contain any denial of liability/guilt (but it need not contain any admission of liability/guilt);
- The EU does not seek to blame another person or entity for the alleged contravention;
- The EU acknowledges the enforceability of the EU;
- The EU acknowledges that the VWA will publish the EU on its website and publicise the proposed or delivered undertakings;
- The EU acknowledges that each party to the EU will bear its own costs.

9. CONSULTATION – EU PANEL

An EU Panel comprised of internal stakeholders then evaluates the EU. The EU Panel will be formed on a case-by-case basis, and will include a relevant Director/Manager of the area/s or industry where the contravention occurred or is impacted by the EU.

The role of the EU Panel is to assist the VWA in its decision-making by evaluating and making a recommendation in relation to an EU.

The VWA will take into account the recommendation of the EU Panel in its decision whether or not to accept an EU. The VWA may still accept an EU that has not been recommended by the EU Panel, or reject an EU that has been recommended by the EU Panel.

Information to EU Panel

Each member of the EU Panel will be provided with a copy of the applicant's EU and any other information provided by the applicant in support of the EU.

The EU Panel will also be provided with other relevant information such as the details of charges against any co-accused, prior convictions, details provided in discussions with the applicant around the content of the EU, and a chronology of the matter so far.

Presentation

The applicant will be provided with the opportunity to present to and discuss the EU with at least one member of the EU Panel if the applicant wishes to do so. A lawyer from the Enforcement Group will also attend this presentation.

At the presentation the applicant will be provided the opportunity to address the queries or concerns of the EU Panel. The applicant may decide to resubmit the EU with or without amendment in consideration of the concerns or queries expressed by the EU Panel at the presentation.

10. EVALUATION CRITERIA

Generally, in light of the nature and extent of the acts and omissions which led to the alleged contravention, the EU Panel will assess the quality of the undertakings proposed and the extent to which they achieve improvements in health and safety generally, and the degree to which the undertakings deliver benefits beyond compliance with the law.

There is no requirement that the undertakings offered within the EU address the root cause of any incident or directly relate to the contravention, particularly where such matters have already been addressed voluntarily or via other means of enforcement.

The Secondary Criteria below impact and help to guide the EU Panel on the evaluation of the Essential Criteria. The EU Panel will assess the substance of the undertakings proposed, and having regard to the Secondary Criteria, assess the undertakings against the Essential Criteria.

The *Essential Criteria* to the acceptance of an EU are:

- The EU extends beyond the applicant's obligations to comply with the Act or the Occupational Health and Safety Regulations 2007;
- The EU offers tangible health and safety benefits to improve health and safety outcomes in:
 - the workplace/the workforce
 - the industry;
 - the community
- The EU is in the public interest.

The *Secondary Criteria* to be applied to the consideration of the Essential Criteria are:

- The significance and seriousness of the contravention;
- The injuries arising from the contravention;
- The prevalence of the risks arising from the contravention;
- Any aggravating circumstances which exist (e.g. specific knowledge about the hazard or risk)
- The prior criminal history of the applicant;
- Whether the applicant is likely to comply with the EU;
- That the EU is capable of enforcement;
- The EU does not include a denial of responsibility or the attribution of responsibility to another party.

EU Panel Recommendation

The EU Panel will consider the evaluation criteria and will make a recommendation in relation to the EU; that it be rejected, accepted, or defer the making of a recommendation.

The EU Panel may defer its recommendation on the basis of queries or concerns, which the applicant will be provided the opportunity to address. The applicant may decide to resubmit the EU with or without amendment in consideration of the concerns or queries of the EU Panel.

The EU Panel will provide written reasons for its decision to recommend or not recommend that an EU be accepted.

11. OTHER CONSULTATION

Where the EU Panel has recommended an EU, the investigator, the inspector and the injured person or family should be consulted and each of their views about potential acceptance of the EU sought.

In matters of concern to the Director of Public Prosecutions, a resolution by way of EU will be canvassed with representatives of the Office of Public Prosecutions.

12. DECISION BY VWA WHERE EU NOT RECOMMENDED BY EU PANEL

The applicant will be advised and will be provided the EU Panel's reasons for not recommending the EU. The applicant is provided this opportunity to consider and address the reasons prior to a decision being made by the VWA.

Any submission in response by the applicant will be provided to the EU Panel for its consideration. The EU Panel will then finalise its recommendation. (The EU Panel may change its recommendation based on the submission of the applicant. If the EU Panel changes its recommendation and supports the EU see para (13) below.)

The recommendation of the EU Panel is not the only consideration the VWA may take into account in its decision. For example, the VWA may have a different view in regard to matters such as the likely penalty or objective seriousness of the offending. Any reasons which would lead the VWA to reject the EU will also be provided to the applicant so that it has the same opportunity to respond to those concerns prior to the final decision being made by the VWA.

As such, there may be circumstances where the VWA may still accept an EU that has not been recommended by the EU Panel. If the VWA decides to accept the EU, see para. (15) below.

If the VWA decides to reject the EU, the applicant will be provided the Notice of Decision including the reasons for the decision. See para (14) below.

13. DECISION BY VWA WHERE EU RECOMMENDED BY EU PANEL

As indicated above, the recommendation of the EU Panel is not the only consideration the VWA may take into account in its decision. Any reasons which would lead the VWA to reject the EU will also be provided to the applicant so that it has the opportunity to respond to those concerns prior to the final decision being made by the VWA.

The VWA will take into account any submission made by the applicant in response to the VWA's concerns.

The VWA may make a decision to accept or reject the EU.

If the VWA decides to accept the EU, it will be signed and exchanged between the VWA and the applicant. The EU is then enforceable and any proceedings on foot against the applicant will be withdrawn. See para (15) following acceptance of an EU.

If the decision is made to reject the EU, the applicant will be provided the Notice of Decision including the reasons for the decision. See para (14) below.

14. FOLLOWING REJECTION OF AN EU

Any court proceedings will continue or a proceeding filed where it is yet to be commenced.

All EU discussions and negotiations are without prejudice and will not be used in any way against the accused.

15. FOLLOWING ACCEPTANCE OF AN EU

Any proceedings against the accused will be withdrawn.

Neither the applicant nor VWA will make any application for costs as agreed in the EU.

The EU will be publicised on the VWA website and a media release or other promotions may be undertaken.

The delivery of the EU will be monitored by the VWA.

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