



Government of **Western Australia**  
Department of **Mines, Industry Regulation and Safety**



**WorkSafe**  
Western Australia

POLICY

# WHS undertakings

## Reference

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# 1 Introduction

Under the *Work Health and Safety Act 2020* (WHS Act), the WorkSafe Commissioner is the regulator and is responsible to the Minister for the administration of the WHS Act and any other laws relating to work health and safety. The regulator is supported by the Department of Mines, Industry Regulation and Safety (DMIRS) and its officers.

Pursuant to section 216 of the WHS Act, the regulator may accept a written undertaking (a WHS undertaking) given by a person in connection with a matter relating to a contravention or alleged contravention of the WHS Act.

## 2 Scope

This policy sets out the regulator's processes and criteria for considering a proposal to enter into a WHS undertaking from a person who has committed or allegedly committed an offence against the WHS Act.

This policy has been prepared to set out guidelines relating to the acceptance of WHS undertakings in accordance with the regulator's obligations under section 230 of the WHS Act and should be read in conjunction with the regulator's Prosecution policy and the WHS Act.

## 3 What is a WHS undertaking?

A WHS undertaking is a written, legally binding agreement proposed by a person following a contravention or alleged contravention of the WHS Act.

A WHS undertaking is a high level sanction used where the alleged contravention is of a serious nature. It is a written promise made by the person to undertake certain activities within a particular timeframe.

A WHS undertaking becomes enforceable when the regulator's decision to accept has been given to the person who made the undertaking.

## 4 A WHS undertaking as an alternative to a prosecution

The regulator may accept a WHS undertaking as an alternative to a prosecution if it is appropriate in the circumstances, and if it is likely to deliver superior work health and safety outcomes to a court sanction. In some instances, a WHS undertaking may be a preferred approach to a prosecution because it is expected to achieve outcomes that cannot generally be achieved by a court sanction. The range of actions available through a WHS undertaking can provide a more systematic and enduring response, tailored to the nature of the non-compliance with broader benefits for the industry and community.

A WHS undertaking does not constitute an admission of guilt by the person providing it in relation to the alleged contravention. Court proceedings cannot be brought against a person for the alleged contravention to which a WHS undertaking relates while the WHS undertaking is in effect and is being complied with.

## 5 When can a WHS undertaking be proposed?

The WHS Act does not restrict the time that a WHS undertaking can be proposed or accepted and a WHS undertaking may be accepted whether or not a prosecution has been commenced. The regulator recognises that there may be benefits in considering a WHS undertaking early after an offence or an alleged offence has occurred.

## 6 When a WHS undertaking cannot be accepted

The WHS Act prohibits the acceptance of a WHS undertaking for a Category 1 offence or an industrial manslaughter offence. This means that a WHS undertaking cannot be accepted in regard to an offence arising from a failure to comply with a health and safety duty where the failure causes the death of, or serious harm, to an individual. A WHS undertaking may be appropriate in regard to other offences under the WHS Act, including contraventions of health and safety duties if the contravention does not result in death or serious harm.

## 7 When a WHS undertaking may not be accepted

WHS undertakings generally will not be considered by the regulator to be appropriate when any of the following circumstances exist:

- The person has a recent prior conviction or finding of guilt against the WHS Act, *Mines Safety and Inspection Act 1994* (MSI Act) or the *Occupational Safety and Health Act 1984* (OSH 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 matter was more than five years prior to the contravention that is the subject of the proposed WHS undertaking.
- The person has two or more recent prior convictions or findings of guilt against the WHS Act, MSI Act or the OSH Act arising from separate investigations, unless the most recent matter concluded more than five years prior to the contravention that is the subject of the proposed WHS undertaking.

If a proposed WHS undertaking falls into any of the categories outlined above, the person will be informed in writing of the relevant category of exclusion applicable and the WHS undertaking will be rejected. The person will then be provided with an opportunity to make submissions to the regulator which identify any exceptional circumstances which exist that demonstrate that a WHS undertaking would be more appropriate than a prosecution.

## 8 Assessment of a WHS undertaking

The regulator will generally consider a WHS undertaking as an alternative to a prosecution if doing so is in the public interest and the person proposing the WHS undertaking is able to demonstrate that the WHS undertaking will deliver tangible work health and safety benefits to the workplace, industry and community. The regulator's *Prosecution policy* sets out the criteria applied when considering the public interest.

An assessment by the regulator of a proposed WHS undertaking will involve two stages of consideration.

### Stage 1 Eligibility

The first stage is initiated by an expression of interest by the person to the regulator about the possibility of a WHS undertaking. In assessing whether a WHS undertaking is appropriate, the regulator will consider the following factors:

- the level of alleged culpability of the person
- the degree of risk arising from the alleged contravention
- the person's history of compliance.

Should the regulator determine that a person is not eligible for a WHS undertaking, the person will be informed of the preliminary view to refuse and be provided with a reasonable opportunity to address the reasons prior to a final decision being reached.

## Culpability

Culpability refers to the extent to which the person may be held responsible for the incident and the nature of the alleged misconduct which gave rise to the alleged contravention.

Consideration of culpability will involve an examination of the work health and safety management practices of the person. This includes what they knew or what they should have reasonably known about the hazards present in the workplace and what they did or should have reasonably done to eliminate or minimise the risk arising from those hazards. This involves an objective assessment of what action (or inaction) is considered to have contributed to the incident.

## Risk

It is the seriousness of the risk arising from the alleged contravention rather than the consequence of the contravention that will be considered. It is not necessary that there be an injury or actual harm for there to be a contravention, or alleged contravention, of the WHS Act. The concept of risk is to be understood as the possibility of danger and does not require that workers or other persons be exposed to actual danger.

Assessment of the seriousness of the risk arising from the alleged contravention will usually involve consideration of the following factors:

- the number of people put at risk
- how long the risk existed
- the degree of consultation that occurred within the workplace, leading up to the alleged contravention
- the actual or potential consequences of the risk created by the alleged contravention.

## History of compliance

Consideration will be given to any evidence of prior non-compliance with work health and safety obligations, and the behaviour of the person in response to previous enforcement and preventative action.

If there is a history of non-compliance and the person has shown insufficient regard for compliance with work health and safety laws, this behaviour may lessen the likelihood of a WHS undertaking being considered an appropriate enforcement measure.

## Stage 2 Evaluation

If the regulator decides that a WHS undertaking is potentially appropriate following an assessment for eligibility, the second stage is where the merits of a proposed WHS undertaking are considered.

At this stage the person prepares and submits a written WHS undertaking proposal.

### Details that should be included in the WHS undertaking

This list is not exhaustive, however a submission for WHS undertaking should contain:

- the correct details of the person
- acknowledgement that the regulator has alleged a contravention
- details of the alleged contravention
- details of the events surrounding the alleged contravention
- details of any injury sustained or illness suffered from the alleged contravention
- support to be provided to the injured person(s) to overcome the injury/illness and recover at work

- details of any existing work health and safety management systems at the workplace including the level of auditing currently undertaken
- any rectifications made as a result of the contravention
- a statement of regret
- details about whether the WHS undertaking offers long term, sustainable, measureable and tangible work health and safety benefits to the workplace, industry and community
- the extent that the strategies proposed link to the alleged contravention and the work health and safety duties of the person
- the person's conduct in respect of mitigation and remedial action regarding both the alleged contravention and any person affected by the alleged contravention
- whether the person is likely to comply with the WHS undertaking
- a statement granting the regulator a permanent, non-exclusive licence to use any materials developed as a result of the undertakings.

## Consideration

In considering whether to accept a WHS undertaking, the regulator will give consideration to the following factors:

- the degree to which the WHS undertaking strengthens compliance and/or builds sustainable performance, beyond the persons obligations to comply with the WHS Act
- whether the WHS undertaking offers long term, sustainable, measurable and tangible work health and safety benefits to:
  - the workplace
  - the industry
  - the community
- the extent that the strategies proposed link to the alleged contravention and the work health and safety duties of the person
- the person's conduct in respect of mitigation and remedial action regarding both the alleged contravention and any person affected by the alleged contravention
- support provided to any injured person(s) or proposed to be provided to overcome any injury or illness and recover at work
- the nature of the person's organisation and operations
- whether the person is likely to comply with the WHS undertaking
- any other matter that the regulator considers to be relevant.

## 9 Regulator's notice of decision

If the regulator intends to reject a proposed WHS undertaking, the person will be informed of the preliminary view to refuse and be provided with a reasonable opportunity to address the reasons prior to a final decision being reached.

Should a WHS undertaking be rejected by the regulator, the person will be provided with written reasons.

If the regulator accepts a WHS undertaking the reasons for that decision must be published on the regulator's website.

# 10 Contravention of an accepted WHS undertaking

It is an offence to contravene a WHS undertaking. Once a WHS undertaking is accepted, it is legally binding. A contravention of a WHS undertaking involves failure to comply with the terms of the WHS undertaking. As a WHS undertaking is enforceable by the court, a contravention may result in significant penalties including one or more of the following:

- monetary fines
- a direction to comply with the WHS undertaking
- discharge of the WHS undertaking
- court costs
- the regulator's costs in monitoring compliance with the WHS undertaking in the future
- commencement of proceedings for the original alleged contravention.