

# Enforceable Undertakings Operational Policy

This policy guide sets out the Civil Aviation Authority's (CAA) approach to Enforceable Undertakings under the Health and Safety at Work Act 2015 (HSWA). It will be used to guide CAA's decision-making about Enforceable Undertakings under HSWA.

## Scope of the Document

This document outlines how CAA will deliver Enforceable Undertakings, specifically:

- when a duty holder can apply for an Enforceable Undertaking
- the key stages of an Enforceable Undertaking, including:
  - how CAA 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 CAA's processes are for variations and withdrawals of an accepted Enforceable Undertaking

## 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
- CAA's Regulatory Operating Model
- CAA's Regulatory Enforcement Policy

# 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 available to CAA with decisions made in line with CAA's Regulatory Enforcement Policy.

An Enforceable Undertaking allows a duty holder to voluntarily enter into a binding agreement with CAA 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 that promote the CAA's safety objectives.

An Enforceable Undertaking is not imposed on a duty holder. A duty holder must first express an interest and submit an application. CAA 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.

CAA 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, the work and/or the workplace
  - the wider industry or sector, and
  - the community
- provide acceptable amends to any victims
- support CAA to meet its strategic priorities.

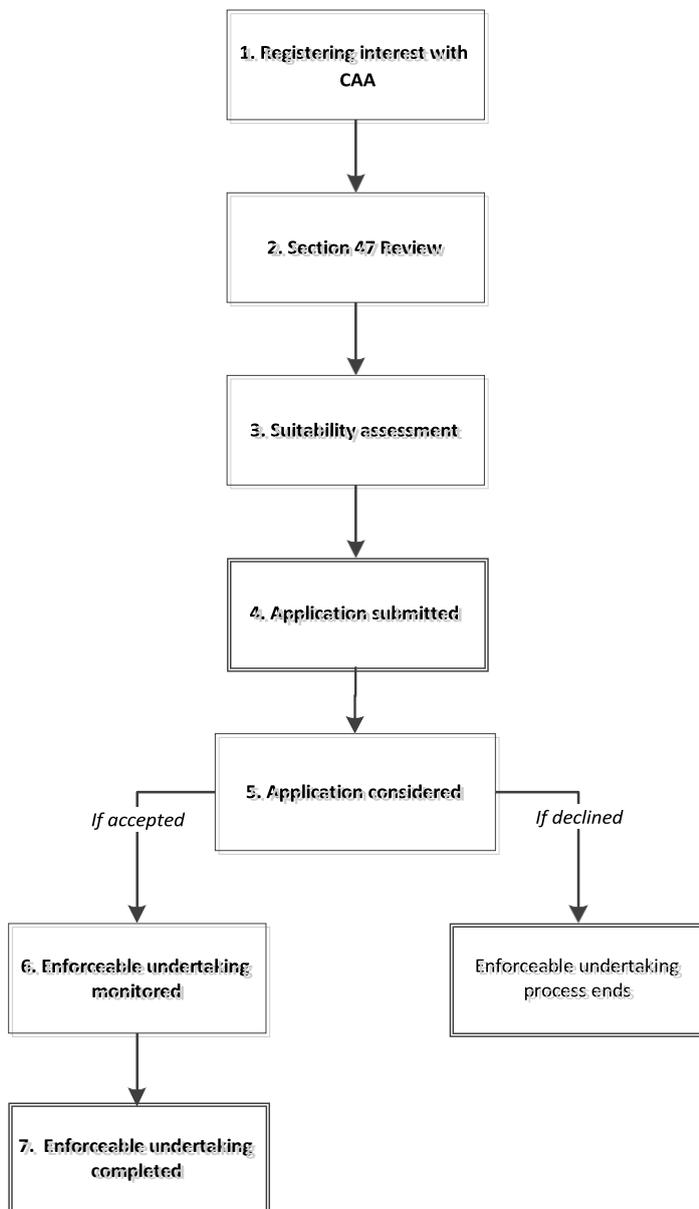
## When can a duty-holder apply for an Enforceable Undertaking?

A duty holder can apply at any time for an Enforceable Undertaking for any contravention of HSWA that may lead to, or has resulted in, a prosecution under the Act. An application can be made even after charges have been laid.

# The 7-Step Process

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The Enforceable Undertaking process has 7 broad steps. These are shown in the diagram below:



## 1. Registering interest with CAA

Any duty holder seeking an Enforceable Undertaking must first register their interest with CAA.

A registration of interest must be made in writing to the Enforceable Undertakings Panel (the EU Panel) via the Enforceable Undertakings email address: [enforceableundertakings@caa.govt.nz](mailto:enforceableundertakings@caa.govt.nz).

Interest can be registered at any time. However, CAA will only consider an Enforceable Undertaking once the investigation of the contravention is complete.

Irrespective of having received a registration of interest, CAA will continue with legal

proceedings as an independent but parallel process.

## 2. Section 47 Review

CAA 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 its interest and CAA has completed its investigation.

Section 123(2) of HSWA prohibits acceptance of an Enforceable Undertaking for section 47 offences. If CAA believes the contravention constitutes a section 47 offence, then the Enforceable Undertaking application will be declined.

If the contravention is deemed not to be a section 47 offence, CAA will apply the Suitability Assessment.

## 3. Suitability Assessment

The Suitability Assessment considers whether an Enforceable Undertaking is an appropriate enforcement outcome given the specific circumstances of the contravention.

CAA 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 the Enforceable Undertaking likely to be challenged by a victim (or their representative), union, employer organisation or other relevant stakeholder?
- Could accepting an Enforceable Undertaking be perceived as contrary to a stated government priority or policy?

The Enforceable Undertakings Panel will review the contravention, consider it against the measures and make an interim assessment and recommendation to the Manager, Investigations and Response. The Manager, Investigations and Response will give final approval of the assessment.

Once the Suitability Assessment is complete, the EU Panel will advise the duty holder in writing that CAA is ready to consider an application.

For any contravention where two or more of the measures are deemed applicable, CAA 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 CAA is ready to consider an application is not a commitment on the part of CAA to enter into an undertaking.

## 4. Submitting an application

Any duty holder submitting an Enforceable Undertaking application must do so in writing using CAA's Enforceable Undertaking application template.<sup>1</sup>

Receipt of an application is not a commitment on the part of CAA 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 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 CAA's strategic priorities is to target risk. Therefore CAA:

- Will align its Enforceable Undertaking decisions with any stated aim or strategy in a given part of the sector, with emphasis on issues identified in our Sector Risk Profiles, State Safety Programme, Statement of Intent and Strategic Business Plan.
- Expects duty-holders from high risk sectors) 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 an 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 the duty holder must accept responsibility for these. CAA 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 CAA has initiated for the

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<sup>1</sup> Insert hyperlink to EU application form on website

contravention will continue until the outcome of the application is finalised.

## 5. Considering the application

When assessing an application, CAA 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 CAA's objectives and supports its strategic priorities.
- Any other matter which CAA thinks relevant.

CAA will contact victims to seek their views on the proposal. Views of victims are important and will be actively considered as part of the decision-making process. CAA may also seek input from other stakeholders as appropriate.

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.

CAA 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 that gave rise to the Enforceable Undertaking and CAA's concerns about the conduct.
- Contains any terms that may impose an obligation on CAA 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 CAA Enforceable Undertaking Review Panel (the EU Panel).

The EU Panel will include the Chief Advisor, Health and Safety and a representative from:

- Inspection and Monitoring;
- Certification;
- Investigation and Response; and
- Legal Services.

The EU Panel may seek input from other areas within the organisation or draw on external expertise as required.

EU Panel membership can be changed over time at the discretion of the DCE Aviation Safety. Panel membership may also change to manage conflicts of interest or in response to staff absences or changes in circumstances.

The Panel cannot include the Enforceable Undertakings Decision Maker (DCE Aviation Safety) or any person who has been directly involved with investigating the contravention.

CAA must be satisfied that Panel members do not have any reasonably foreseeable conflicts of interest with a given Enforceable Undertaking application.

It may be that conflicts of interest are inevitable in some contexts. Where that is the case, CAA 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/recommendations to the DCE Aviation Safety on whether or not the proposal should be accepted.

The EU Panel will review a proposal and determine whether:

- to 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 CAA to enter into 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):

- the lead investigation Inspector and/or their Manager;
- CAA technical specialists;
- Individuals or organisations that exercise delegated powers of the Director, such as Medical Examiners, Senior Persons or Aviation Recreation Organisations; and/or
- External Consultants or Experts.

There will be a written account of any advice provided to the EU Panel by a subject matter expert.

After receiving the EU Panel's recommendation, the DCE Aviation Safety can:

- accept the recommendation of the EU Panel;

- reject the recommendation of the EU Panel; or
- at their discretion, defer the decision on a given proposal to the Director of CAA.

If the decision is to accept the Enforceable Undertaking, CAA 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 victims and relevant stakeholders of the decision and reasons for the decision, and
- publish the accepted Enforceable Undertaking in full, including the reasons for the decision.

CAA will consider the need for a joint public statement on a case-by-case basis after an Enforceable Undertaking is accepted. CAA expects the duty holder to agree to 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 victims. These details will only be redacted in exceptional circumstances. Any decision to redact information will be made by the Deputy Chief Executive, Aviation Safety with advice from the Legal representative on the EU Panel.

If the decision is to decline the proposal, the DCE Aviation Safety 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 for reconsideration addressing the reasons for the decision.

The DCE Aviation Safety will review the re-submission and decide whether or not to confirm the decision to decline. If decision-making has been deferred to the Director of the CAA, this process will be undertaken by the Director.

If the decision is still to decline the Enforceable Undertaking, CAA 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 victims and relevant stakeholders 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 CAA to assess whether or not it is being complied with and whether the benefits expected from the Enforceable Undertaking have been realised.

CAA will determine how an Enforceable Undertaking will be monitored and will be responsible for monitoring it once it is accepted. The Enforceable Undertaking requirements may be incorporated into the document holder's exposition as required.

A monitoring schedule will be developed and included as part of CAA's acceptance of a proposed Enforceable Undertaking. 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 Manager, Monitoring and Inspection. 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 CAA that they are fulfilling the terms of the Enforceable Undertaking and to provide reports on time as detailed in the schedule.

CAA 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.

CAA 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 victims and other interested parties as detailed in the undertaking, and
- CAA inspections.

If CAA 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 victims of the completion of the Enforceable Undertaking, and
- update the register.

## Non-completion, variations and withdrawals

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### What happens if a duty holder does not comply with an Enforceable Undertaking?

Failing to comply with an Enforceable Undertaking is an offence under section 126 of HSWA.

If CAA 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, CAA may also bring proceedings for the contravention of the related safety legislation.

### What are CAA'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 CAA, withdraw the undertaking or vary the agreement.

Requests for withdrawal of an Enforceable Undertaking must be approved by the DCE Aviation Safety. It will be assessed by the EU Panel, who will make recommendations to the DCE regarding a decision.

If CAA 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.

CAA will seek the views of the victims for any request to withdraw an application. Views of victims are important and will be actively considered as part of our decision-making process.

If CAA has consented to a withdrawal, it may take legal action in relation to the original offence or alleged offence related to the Enforceable Undertaking.

If CAA consents to the withdrawal it will:

- advise the duty holder in writing of the decision and reasons for the decision,
- notify victims of the decision and reasons for the decision, and
- publish the decision to withdraw an Enforceable Undertaking.

If CAA 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 CAA. If the duty holder does not continue to comply with the Enforceable Undertaking, CAA may pursue enforcement action.

## Variation of the Enforceable Undertaking

A request for variation of an Enforceable Undertaking must be approved by the DCE Aviation Safety. It will be assessed by the EU Panel, who will make recommendations to the DCE regarding a decision.

CAA will seek the views of the victims and relevant stakeholders for any request to vary an application. Views of victims/stakeholders are important and will be actively considered as part of our decision-making process.

CAA 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 alleged contravention.

If CAA 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 victims of the decision and reasons for the decision; and
- publish the decision to vary the Enforceable Undertaking.

If CAA declines the request to vary an Enforceable Undertaking, 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 vary an undertaking is declined, the duty holder will be required to continue delivering the Enforceable Undertaking as originally accepted by CAA.

## What costs will be recovered by CAA in an Enforceable Undertaking?

A charge at the standard rate is payable for costs incurred to CAA for monitoring the Enforceable Undertaking in accordance with the Civil Aviation Charges Regulations, Part 9 section 13(i).

## Definitions

The following terms are used in reference to Enforceable Undertakings:

<b>Contravention</b>	<p>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 as well as contraventions of other enactments that may provide the basis for a charge under HSWA.</p> <p>For the purposes of this policy, a contravention also includes an alleged contravention.</p>
<b>Decision Maker</b>	<p>The person who receives advice from the CAA Enforceable Undertaking Review Panel and makes the final decision about whether or not to accept a proposed Enforceable Undertaking. This is the Deputy Chief Executive Aviation Safety</p> <p>The Decision Maker can, at their discretion, defer decision-making on any given Enforceable Undertaking to the Director of Civil Aviation.</p>
<b>Duty Holder</b>	<p>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.</p>
<b>Enforceable Undertaking</b>	<p>An enforcement pathway that allows a duty holder to voluntarily enter into a binding agreement with CAA. It is generally used as an alternative to prosecution.</p> <p>The agreement outlines actions the duty holder will undertake to address the contravention. It is expected to deliver activities that benefit workers, the wider industry or sector and/or the community as well as acceptable amends to any victims.</p>
<b>Fatal Illness</b>	<p>One that causes, or will cause, the death of an individual.</p>
<b>Fatal Injury</b>	<p>One that causes the death of an individual.</p>
<b>HSWA</b>	<p>Health and Safety at Work Act 2015.</p>
<b>Suitability Assessment</b>	<p>An assessment to determine whether an Enforceable Undertaking is an appropriate enforcement outcome given the specific circumstances of a contravention.</p>
<b>CAA Enforceable Undertaking Review Panel (EU Panel)</b>	<p>A group that considers Enforceable Undertaking applications and makes recommendations to the DCE Aviation Safety about whether the proposal should be accepted or not.</p> <p>The Panel consists of the Chief Advisor, Health and Safety and a representative from:</p> <ul style="list-style-type: none"> <li>• Inspection and Monitoring;</li> <li>• Certification;</li> <li>• Investigation and Response; and</li> <li>• Legal Services</li> </ul> <p>The EU Panel may seek input from other areas within the organisation or draw on external expertise as required.</p>
<b>Vulnerable Victim</b>	<p>Someone who has little control over their situation and may be more easily harmed, affected or hurt.</p> <p>Examples of vulnerable people include, children; members of the public; young or elderly workers; pregnant or breast-feeding mothers or migrant workers.</p>