

Enforceable undertakings – an overview

Disclaimer

This publication may contain work health and safety and workers compensation information. It may include some of your obligations under the various legislations that WorkCover NSW administers. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website (www.legislation.nsw.gov.au).

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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1. Introduction

This document provides an overview of enforceable undertakings under the *Work Health and Safety Act 2011* (WHS Act). If you are intending to propose an enforceable undertaking, also read the publication *Enforceable undertakings – guidelines for proposing an undertaking* which is available at workcover.nsw.gov.au.

1.1 Definitions

Meanings of particular words used within this document:

- Category 1 offence – a person commits a category 1 offence if: (a) the person has a health and safety duty; and (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and (c) the person is reckless as to the risk to an individual of death or serious injury or illness.
- Category 2 offence – a person commits a category 2 offence if: (a) the person has a health and safety duty; and (b) the person fails to comply with that duty; and (c) the failure exposes an individual to a risk of death or serious injury or illness.
- Category 3 offence – a person commits a category 3 offence if: (a) the person has a health and safety duty; and (b) the person fails to comply with that duty.
- Enforceable undertaking – a written undertaking proposed by a person in connection with a matter relating to an alleged contravention by the person of the WHS Act. Once accepted by WorkCover the undertaking becomes enforceable. A work health and safety undertaking provided for in part 11 of the WHS Act is referred to by WorkCover as an ‘enforceable undertaking’ or ‘undertaking’.
- OHSMS – an occupational health and safety management system.
- Term of an undertaking – is something for which the person can be held accountable if the undertaking is accepted.
- The person – the duty holder who proposes an enforceable undertaking and against whom the undertaking becomes enforceable if accepted. The term includes a reference to a body corporate, the crown and a public authority as well as an individual.
- Very serious injury – for this publication, is an injury that has caused nervous system damage liable to lead to mental incapacity or permanent restriction of mobility or involves a major amputation of a limb or parts of the body – for example amputation above the knee or elbow. This term is not defined in the WHS Act; it is used within this document to identify certain circumstances which will trigger additional steps in the enforceable undertaking process.
- WorkCover – WorkCover Authority of NSW and is the agency responsible for administering the enforceable undertakings program.

2. Background

In the event of an alleged contravention of the WHS Act, WorkCover may, as an alternative to prosecuting the contravention, accept an enforceable undertaking given by the person who is alleged to have committed the contravention.

An enforceable undertaking is a high level sanction which is legally binding and is used where the alleged contravention is of a serious nature. Accepted enforceable undertakings will form part of the duty holder’s compliance history. An enforceable undertaking provides an opportunity for organisational reform to implement effective workplace health and safety.

Each proposed undertaking is considered on its merit taking into account matters such as the seriousness of the alleged contravention. An enforceable undertaking should aim to deliver tangible benefits to the workers, industry and the broader community.

A flowchart of the steps involved in an enforceable undertaking is provided in Appendix 1.

3. Legislative basis

Part 11 of the WHS Act deals with work health and safety undertakings referred to as 'enforceable undertakings' or 'undertakings' by WorkCover. WorkCover may accept a written enforceable undertaking. Provision is also made for the enforcement of undertakings through court orders.

An enforceable undertaking may be proposed in a variety of circumstances including where an alleged contravention has been identified by WorkCover and the circumstances of the matter may lead to a high level enforcement response such as prosecution. An enforceable undertaking can also be proposed after a complaint has been laid and a summons to appear in court has been issued.

A person may be advised of the option of proposing an enforceable undertaking but cannot be compelled to propose an enforceable undertaking. Similarly, a person cannot compel WorkCover to accept an enforceable undertaking. It is up to the person, or the person's authorised representative, to propose an enforceable undertaking for consideration by WorkCover.

The proposal of an enforceable undertaking does not constitute an admission of guilt in respect of the alleged contravention, to which the undertaking relates.

However, an enforceable undertaking cannot be accepted for an alleged contravention of a category 1 offence. A proposed enforceable undertaking will not be considered until WorkCover is satisfied, following investigation, that a matter does not relate to a category 1 offence.

3.1 Timeframe for proposal

A person considering an enforceable undertaking must negotiate a timeframe for submission with WorkCover.

Investigations and any legal proceedings will continue until such a time as any proposed enforceable undertaking is accepted. Early agreement on acceptable timeframes with WorkCover is desirable to ensure a timely consideration of the enforceable undertaking.

3.2 Workers' compensation/civil action

A person intending to make a workers' compensation claim or who wishes to pursue civil legal remedies is not prevented from doing so because of an enforceable undertaking.

4. Deciding to propose an undertaking

There are substantial benefits to a person proposing an enforceable undertaking including improved safety outcomes for the workplace, industry and the community. However, a decision to propose an enforceable undertaking should not be taken lightly, as the activities associated with an enforceable undertaking are substantial, on-going and may be several times the value of the fine a court may impose for the matter.

Before deciding whether to propose an enforceable undertaking, the best option is to contact WorkCover for advice. WorkCover will assist the person to understand what an enforceable undertaking is and the proposal process. The duty holder may also wish to obtain legal advice.

5. Developing the proposal

An enforceable undertaking comprises of two sections – general information and enforceable terms.

The general information provides WorkCover with background information on the person and relevant matters surrounding the alleged contravention. WorkCover may verify the information that has been set out in the enforceable undertaking.

Enforceable terms are the commitments made by the person, in connection with the enforceable undertaking. These will be monitored and assessed by WorkCover to determine compliance.

Both the general information and enforceable terms form part of the evaluation by WorkCover.

5.1 Section 1 – general information

An enforceable undertaking must include the following information:

- details of the person proposing the enforceable undertaking
- details of the alleged contravention
- details of the events surrounding the alleged contravention, eg incident details
- an acknowledgement that WorkCover has alleged a contravention has occurred
- details of any injury that arose from the alleged contravention
- details of any notices issued that relate to the alleged contravention
- a statement of assurance about future work health and safety behaviour
- when an alleged contravention is associated with an injury/illness:
 - the details of the type of workers compensation provided (if the injured person is a worker of the person)
 - details of the support provided, and proposed to be provided, to the injured person to overcome the injury/illness
 - if the matter involves a fatality or very serious injury¹, a claim to demonstrate that exceptional circumstances exist and an enforceable undertaking is a more appropriate response than pursuing prosecution
- details of any existing occupational health and safety management systems at the workplace including the level of auditing currently undertaken
- details of any consultation undertaken within the workplace regarding the proposal of an enforceable undertaking
- a statement of regret that the incident occurred ie not an admission of guilt – refer section 216(3) of the WHS Act
- any rectifications made as a result of the alleged contravention
- an acknowledgement that the enforceable undertaking may be published and publicised
- a statement of ability to comply with the terms of the enforceable undertaking
- where a term involves a donation, details of any relationships held with the beneficiaries and details of how the reason for the donation will be communicated to the beneficiary
- a statement granting WorkCover a licence to use the person's intellectual property developed as part of the enforceable undertaking.

The person may be required to provide a statutory declaration outlining details of any prior work health and safety convictions² or findings of guilt under work health and safety legislation or any work health and safety related legislation. This information will not be published in the undertaking but will be used as part of the enforceable undertaking evaluation process.

¹ An injury that has caused nervous system damage liable to lead to mental incapacity or permanent restriction of mobility or involves a major amputation of a limb or parts of the body, for example, amputation above the knee or elbow.

² Subject to any local legal constraints such as spent conviction legislation.

5.2 Section 2 – enforceable terms

The enforceable undertaking must set out the following terms, which the person will be accountable for completing. Where possible all terms are to have a nominated cost to deliver the term and a nominated period, following the acceptance of the enforceable undertaking, by which the term will be met.

- A commitment that the behaviour that led to the alleged contravention has ceased and will not reoccur.
- A commitment to the ongoing effective management of work health and safety risks.
- A commitment to disseminate information about the enforceable undertaking to workers, and other relevant parties (which may include work health and safety representatives), and in the annual report (if applicable).
- A commitment to participate constructively in all compliance monitoring activities of the enforceable undertaking.
- Strategies that will deliver worker benefits.
- Strategies that will deliver industry benefits.
- Strategies that will deliver community benefits. Proposed initiatives must focus on delivering work health and safety outcomes within the community rather than merely being a general financial donation that can be used as the recipient determines.
- A commitment that any promotion of a benefit arising from the enforceable undertaking will clearly link the benefit to the undertaking and that the undertaking was entered into as a result of an alleged contravention.
- Where WorkCover considers appropriate in the circumstances:
 - A commitment to establish and maintain (or maintain if a system already exists) an OHSMS, acceptable to WorkCover, that meets the principles of AS/NZS 4804: 2001 *Occupational health and safety management systems – general guidelines on principles, systems and supporting techniques*
 - A commitment to ensure the OHSMS is audited by third party auditors that meet the principles of AS/NZS 4801: 2001 *Occupational health and safety management systems – specification with guidance for use as set by WorkCover*
 - A commitment to provide a copy of each finalised OHSMS audit report to WorkCover along with a letter certifying that the report has not been altered from the copy provided by the OHSMS auditor
 - A commitment to implement the recommendations from these audits (unless otherwise negotiated with WorkCover).

5.3 Unacceptable inclusions

An enforceable undertaking must not include:

- a denial of liability (it also need not include an admission of liability)
- any terms which may set up defences for possible non-compliance with the enforceable undertaking,
- any terms which may set up defences for possible future contraventions of the WHS Act
- any terms that may impose an obligation on WorkCover or any other person without the person's consent.

5.4 Possible strategies

Strategies included in an enforceable undertaking must extend beyond compliance with the legislation.

Enforceable undertakings allow more flexible and broad outcomes than those available through prosecution in the courts. The outcomes may include, but are not limited to, a combination of the following:

- conducting, facilitating or funding research into a safety issue relevant to the industry
- implementation of specified projects, such as special training programs to address particular needs for workers, supervisors and management
- promotion and education campaigns targeted to various sectors
- targeted publicity regarding the alleged contravention
- employing and/or funding work health and safety expertise within the workplace and/or industry sector
- community service commitments, such as implementation of an industry-wide awareness program or publication of material dealing with the enforceable undertaking in relevant trade journals or newspapers
- donation of funds to 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 person's industry
- funding tertiary scholarships for work health and safety students in consultation with relevant universities.

6. Evaluation of the proposal

The proposed enforceable undertaking will be evaluated with regard to:

- the proposed enforceable undertaking's merits and benefits
- the person's financial ability to meet the terms of the proposed enforceable undertaking
- the significance of the commitment compared to the capability of the person
- the person's compliance history
- the support the person has provided, and has committed to provide into the future to the injured person(s) or their dependants
- the input from injured persons, next or kin or guardians (as relevant)
- the likely outcome should the matter to be dealt with through legal proceedings.

The evaluation will rely upon the information provided in the proposed enforceable undertaking. This information may be subject to verification by WorkCover.

6.1 Merits and benefits of the undertaking

In addition to determining whether the terms outlined in section 5 are addressed appropriately, the merits and benefits of the proposed enforceable undertaking will be assessed having regard to:

- the nature and extent of the act or omission giving rise to the alleged contravention
- the quality of the strategies proposed and the extent to which they are likely to achieve measurable improvements in work health and safety
- the degree to which the enforceable undertaking delivers benefits beyond compliance with the law.

6.2 Input from injured person(s), next of kin or guardian (as relevant)

The evaluation process allows for consideration of information from injured person(s) (next of kin, or guardians as relevant) associated with the proposed enforceable undertaking. The information sought from the injured person(s) can include:

- the incident
- the injured person's general views on safety management at the workplace – apart from safety issues relating to the incident
- details of his/her current employment status
- details of his/her likely future work capacity
- details of the injured person's recovery from the injury
- information regarding the rehabilitation program(s) the injured person has been involved in
- information regarding any assistance the person proposing the enforceable undertaking has provided to improve the injured person's quality of life since the incident
- the injured person's views on whether an enforceable undertaking would be an acceptable alternative to the matter being addressed through legal proceedings.

Note: The injured person is not provided a copy of the proposed enforceable undertaking but does receive a copy of the undertaking if it is accepted by WorkCover.

The injured worker's views are recorded as part of the evaluation of the enforceable undertaking.

6.3 Decision to accept/reject proposal

An enforceable undertaking becomes enforceable when accepted by WorkCover. If an enforceable undertaking is not accepted, the person proposing the undertaking will be advised of the reason, and legal proceedings may be instituted or where adjourned, these may be reinstated.

The decision of WorkCover on the merits of the application is final. There is a right of appeal to the Administrative Decisions Tribunal for administrative review of the manner in which the decision was made pursuant to the *Administrative Decisions Tribunal Act 1997*.

The decision to accept or reject an undertaking will be advised in writing to the person along with reasons for the decision.

6.4 Request to vary or withdraw an undertaking

Prior to WorkCover accepting an enforceable undertaking, the person can withdraw or vary the proposed undertaking. Once an enforceable undertaking has been accepted it can only be withdrawn or varied with the written agreement of WorkCover. However, the provisions of an enforceable undertaking cannot be varied to provide for a different alleged contravention.

7. Communication about enforceable undertakings

7.1 Publicising enforceable undertakings

Publicising enforcement outcomes assists in fostering a culture of compliance.

A notice of decision to accept (and the reasons for accepting), vary or withdraw an enforceable undertaking will be published on WorkCover's website. A notice of the acceptance of an enforceable undertaking, along with a summary of the terms of the undertaking may generally be published in a newspaper within the State that would likely have a readership that would relate to the undertaking.

In general, all enforceable undertakings that have been accepted are published on WorkCover's website. WorkCover will blank out text where necessary to ensure compliance with privacy legislation and meet agreed commercial-in-confidence aspects.

7.2 Promotion of the enforceable undertaking

In addition to disseminating the terms of the enforceable undertaking through the workplace after acceptance, a person may seek to promote, individually or with WorkCover, the benefits obtained through an enforceable undertaking. Where a person seeks to promote the benefits it must be made clear that any such benefits arose as a result of an enforceable undertaking with WorkCover as a result of an alleged contravention of the work health and safety legislation. The promotion could be through joint presentations to industry peers or media press releases.

8. Compliance monitoring

The date of acceptance of the enforceable undertaking by WorkCover designates the start date for monitoring and reporting purposes. Results of compliance monitoring will be communicated to the person.

The person's compliance with the terms of the enforceable undertaking will be monitored by WorkCover to ensure that all commitments given in the undertaking have been implemented. WorkCover will undertake activities confirming:

- all terms are being implemented, or complied with, as set out in the enforceable undertaking, and in accordance with relevant timeframes
- that any required OHSMS audits have been conducted
- actions arising from the OHSMS audits have been submitted and implemented.

Material, documents etc, offered as evidence of compliance must be retained by the person throughout the period of the enforceable undertaking.

8.1 Occupational health and safety management system related terms

As the OHSMS audits are conducted by auditors engaged by the person, monitoring by WorkCover for OHSMS-related terms will confirm that:

- there is an OHSMS in place
- audits are being conducted by suitably accredited auditors
- audit recommendations are being implemented appropriately in accordance with enforceable undertaking timeframes.

The fact sheet entitled *Enforceable undertakings – information for auditors* outlines the requirements for auditors and audit reports.

8.2 Non-occupational health and safety management system related terms

It is the signatory's responsibility to satisfy WorkCover that the terms of the undertaking are being complied with in accordance with the enforceable undertaking.

WorkCover will assess the evidence provided to determine whether compliance has been achieved.

Depending on the term, WorkCover may also initiate verification activities to collect evidence to satisfy itself of compliance.

9. Failure to comply with an enforceable undertaking

It is an offence to contravene an enforceable undertaking. The maximum penalty for failure to comply is:

- \$50,000 for an individual
- \$250,000 for a body corporate.

In addition to the imposition of any penalty, a court may make one or both of the following orders:

- direct the person to comply with the enforceable undertaking, or
- discharge the enforceable undertaking.

The court may also make any other orders it deems appropriate in the circumstances, including orders directing the person to pay to the state:

- the costs of the proceedings
- the reasonable costs of WorkCover in monitoring compliance with the enforceable undertaking in the future.

In addition to the above penalties for failing to comply with an enforceable undertaking, WorkCover may also, within a specified timeframe, commence court proceedings for the original alleged contravention to which the enforceable undertaking relates.

10. Duration of the enforceable undertaking

The duration of an enforceable undertaking is determined by the content of the agreed terms. An enforceable undertaking commences and is enforceable once accepted by WorkCover.

An enforceable undertaking will be concluded on written advice from WorkCover when all requirements of the undertaking have been satisfactorily executed.

11. Effect of third party request for prosecution

Under the WHS Act if any person reasonably considers that a category 1 or category 2 offence has occurred and WorkCover has not commenced prosecution action after six months, the person may, within 12 months, write to WorkCover to request a prosecution be commenced.

WorkCover must consider this request and advise both the person making the request and the person subject to the allegation, of WorkCover's decision regarding the commencement of a prosecution. WorkCover is not obligated to commence a prosecution.

If the person making the request disagrees with WorkCover's decision, he/she may ask WorkCover to refer the matter to the Director of Public Prosecutions (DPP) for consideration.

The DPP will consider the matter and advise WorkCover whether the DPP considers a prosecution should be brought. WorkCover is required to provide the person with the DPP's advice. The DPP's advice is not binding on WorkCover to commence a prosecution. If WorkCover declines to follow the advice of the DPP to bring proceedings WorkCover must give written reasons for the decision to the person.

To allow any request to be properly considered, where an application for an enforceable undertaking has been received, the enforceable undertaking application will be placed on hold while the prosecution request is considered.

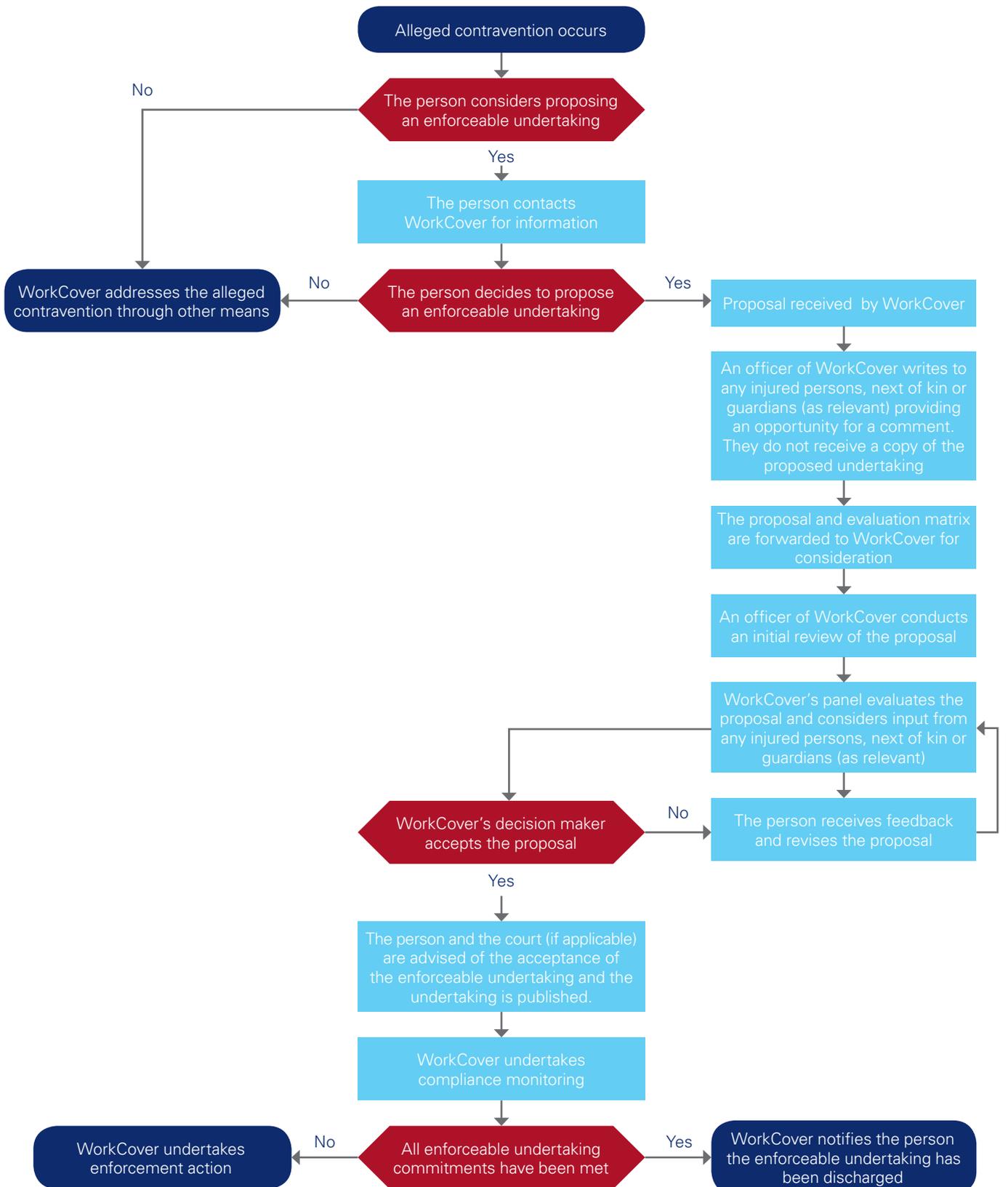
12. Further information

Further information is available in the following documents:

- *Enforceable undertakings – information at a glance*
- *Enforceable undertakings – information for injured persons, next of kin or guardians*
- *Enforceable undertakings – information for auditors*
- *Enforceable undertakings – guidelines for proposing an enforceable undertaking* for people who have received a complaint and summons for an alleged work health and safety contravention.

These publications can be obtained at workcover.nsw.gov.au.

13. Appendix 1 – Flowchart of the process



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