

*This month we take a deeper dive into enforceable undertakings. We look at what they involve, four recent examples and what factors may make a proposed enforceable undertaking more attractive to WorkSafe. We also have articles on two recent WorkSafe prosecutions. The first arose after the tragic death of a worker from exposure to hydrogen sulphide gas and resulted in a very substantial fine and reparation award. The second prosecution followed a worker having her thumb severed in inadequately guarded machinery.*

## Company pays \$810,000 following worker's death from chemical poisoning

A large [waste management company](#) has been fined \$450,000 and ordered to pay reparations of \$360,000 following a sentencing for the death of a worker in August 2017.

The victim had been directed to carry out the dangerous mixing of reactive chemicals to treat hazardous waste from an electrical substation. He was overcome by hydrogen sulphide gas generated in a treatment pit and died in hospital a few hours later.

WorkSafe's investigation identified a breakdown of systems at the site, with health and safety failures "at every level".

The hazardous waste that was being treated on the day had sat unmarked on the site for six months. It was never officially recorded or tested or labelled by the site chemist.

On the day of the fatal poisoning, the hydrogen sulphide alarm repeatedly rang but work continued after the alarm was reset. When the victim collapsed mid-afternoon, he had already been exposed to 50 times the maximum exposure to hydrogen sulphide allowed by the workplace exposure standard for a full eight-hour period.

WorkSafe also identified a lack of personal protective equipment (PPE) for workers and an inadequate risk assessment.

At sentencing, Judge Davidson said a "wholesale systemic failure" had led to the creation of a "fatal gas chamber" at the facility. WorkSafe commented that: "Exposing workers to this degree of danger is unacceptable to WorkSafe, and negligent in the extreme" and that the company's failure was "appalling" on "so many levels".

Hydrogen sulphide is a highly toxic gas. It is colourless and heavier than air. It is the gas that gives geothermal areas their distinctive "rotten egg" smell although paradoxically, at high concentrations it rapidly deadens the sense of smell so no odour is detected by those who are exposed to it and at risk of poisoning.

Information on managing the risk of poisoning from hydrogen sulphide in geothermal settings is available from [WorkSafe](#). More general information is available from [WorkSafe British Columbia](#).

In all settings, hydrogen sulphide can kill at much lower levels than many other toxic gases and PCBUs must have robust safety measures in place if workers may encounter it as part of their work.



*"As a part of a cost-cutting experiment all of our safety measures will be replaced with these good luck charms."*

## Egg processing company sentenced after worker's thumb severed in machinery

Failure to adequately guard machinery is an ongoing cause of injury and death in New Zealand. Over the last year alone, there were 525 [injuries](#) that resulted in more than a week away from work as a result of workers being trapped in moving machinery. And because there is a detailed and widely accepted machine guarding standard (the AS/NZS 4024 series), WorkSafe often prosecutes when serious injury occurs.

A South Auckland [egg processing company](#) has been fined \$200,000 and ordered to pay reparations of \$30,000 to the victim after a worker was injured in inadequately guarded machinery.

The incident occurred in October 2020 when the victim was cleaning machinery at the plant. Her thumb was severed when it got caught between the edge of an opened access latch and the rotating blade of a screw conveyor.

The WorkSafe investigation found that workers were aware of the hazard but management were not. Staff were using "workarounds" at the site and health and safety matters were raised in ad hoc ways.

You can read more about guarding machinery during cleaning and maintenance in Issue 6 of the [Safe Side](#).

## Revisiting enforceable undertakings

The number of enforceable undertakings (EUs) being accepted by WorkSafe may be on the rise again. When EUs first became available, WorkSafe accepted 11 from April 2017 to March 2018 and then 13 the following year. That number then dropped steeply to four over the whole of 2021. But in the first half of this year, four EUs have already been accepted by WorkSafe. These were the EUs proposed by large contracting companies [Downer New Zealand Ltd](#) and [McConnell Dowell Constructors Ltd](#); and another two by the Boards of Trustees of [Melville High School](#) and [Tarawera High School](#).

All four EUs related to incidents where the victim died. This suggests that a fatality is now less likely to be an impediment to getting an EU accepted. In a tragic coincidence, both Boards of Trustees were investigated after a pupil from each school drowned while on a school field trip – the first, a 16-year-old pupil who was undertaking an open water snorkelling activity at Lake Rotoma in March 2020; and the second, a Year 13 geography student who was swimming at Waihi Beach in February 2021.

The [Downer New Zealand and McConnell Dowell](#) EUs both related to the death of a young woman cyclist at a road works site on the Christchurch Southern Motorway extension. Fyfa Campbell Dawson was riding to work along the designated temporary route when she collided with a truck entering the site and was killed. A subsequent WorkSafe investigation alleged Downer New Zealand and McConnell Dowell failed to ensure a safe and effective temporary traffic management system was in place to protect the public.

### What is an EU?

An EU is an agreement between WorkSafe and a duty holder made under [section 123](#) of HASWA. A duty holder may put forward an EU proposal following a breach or alleged breach of the Act. In practice, WorkSafe generally accepts EU as an alternative to prosecution. This means the EU will not be formally considered until the investigation is completed and HASWA charges have been filed. If the EU is accepted, the charges are withdrawn and no criminal conviction is recorded. All EU agreements are published on WorkSafe's website and details are often publicised in a media release.

Once the EU is accepted by WorkSafe, it is legally binding and it is an offence to contravene it. By law, WorkSafe must not accept an EU if the breach amounts to an offence against section 47 of HASWA – the most serious level of offending that involves reckless conduct.

### What does an EU involve?

An EU sets out actions that a duty holder agrees to take. WorkSafe says that the agreed actions are expected to:

- support progressively higher standards of work health and safety for the benefit of:
  - the workers and/or work and/or the workplace
  - wider industry or sector, and
  - community
- remedy the harm caused to any victim(s), and
- support WorkSafe to meet its strategic priorities.

Generally, at least some of the agreed actions will need to relate to addressing the failures that allowed the breach to occur. Other actions often include donations to a charity. All EUs involve paying amends to the victim/s.

In the case of the McConnell Dowell and Downer EUs, the companies agreed to scoping a study (and pilot) to mitigate risks to vulnerable road users. Individually, they also agreed, amongst other things, to develop an NZQA qualification, undertake a fleet training programme focusing on vulnerable road users and develop a virtual reality temporary traffic management simulator. For the school boards of trustees, the agreed actions included donations and targeted water safety initiatives.

WorkSafe has published [general guidance](#) on EUs, and if one is being considered, it pays to be familiar with this. It may also be helpful to look at the [Enforceable undertakings – Operational policy](#) and [Enforceable Undertaking Practice Guide](#).

### What makes an EU more likely to be accepted?

The reasons why WorkSafe accepts some EUs and rejects others remain somewhat opaque. However, VL has identified some factors that may make it more likely that an EU will be accepted.

First, it seems crucial that the victims support the EU, or at least do not strongly oppose it. For this reason, it pays to build and maintain supportive relationships with victims in the aftermath of a serious incident. Payment of at least some financial amends early on may help facilitate this. VL's [Work Care/Work Accident](#) cover can assist with upfront payments to victims.

Second, the EU should involve spending of a quantum at least equivalent to that which would otherwise have been spent in paying fines and reparations. It may assist to offer more, especially for commercial operations. With prior agreement, VL will cover amends to the victim in the same way and to the same extent that it would cover reparations ordered by the Court. VL will also generally cover the reasonable cost of getting the EU through the acceptance process as a 'defence cost' (but not the cost of implementation).

Lastly, the EU should propose at least some innovative and novel actions that will lead to health and safety improvements in the workplace, industry or community. It is often challenging to develop these types of proposals as many sectors are already well served by initiatives from earlier EUs or existing guidance. A list of all [accepted EUs](#) is published on the WorkSafe website and the [Maritime NZ](#) website. It pays to read these to get a feel for the types of actions an EU may contain.

If a business is considering an EU, VL recommends they discuss this with their lawyer as early as possible. Signalling an interest in an EU and working collaboratively with the WorkSafe EU team may help to get the EU over the line. An experienced VL lawyer will provide advice on the best way to do this.