

# Alternative to health and safety prosecution

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Bernie Napp - Fri, 25 May 2018

An incident happens at your workplace, and the question is whether to face a WorkSafe prosecution, or seek an “enforceable undertaking”.

Earlier this month [Fletcher Construction](#) gained WorkSafe approval to carry out actions in lieu of prosecution over a worker injured at a building site. It committed to spending at least \$203,460 towards the good of the victim, and the wider industry and community.



MinEx CEO Wayne Scott says enforceable undertakings have been common in Australia as a legally-binding alternative to prosecution.

“It’s where companies want to protect their reputation, for example, tendering companies; it’s not unusual for construction companies. They feel so bad about what’s happened, they want to be seen to be sorrowful about it, rather than just cop a fine.”

Since the Health and Safety at Work Act entered into force in 2016, nine other companies in New Zealand have avoided prosecution in this way.

They are: the education-related St Kentigern Trust Board; manufacturers Amcor Flexibles (New Zealand) and National Aluminium; Zespri International; Metropolitan Waste (Waikato); construction firm Directionz; Whitford Park Golf Club; Downer New Zealand; and Earthcare Environmental.

Scott says he can understand why companies in certain circumstances would seek an enforceable undertaking.

“It will be costing Fletchers a lot more than if they had been fined and ordered to pay reparation, but in terms of their contract work going forward, it can be a benefit to them.”

WorkSafe spokesperson Simon Humphries says in the case of a prosecution, the payment of a fine is allocated to the government’s consolidated fund.

“Whereas with an enforceable undertaking, it might have a value of \$200,000 to \$250,000, and it goes back to industry and the community.”

“There is definitely a misconception that the money received from fines goes directly to WorkSafe; it doesn’t.”

## Criteria for accepting an enforceable undertaking

WorkSafe’s [operational policy on enforceable undertakings](#) describes an enforceable undertaking as “an enforcement pathway that allows a duty holder to voluntarily enter into a binding agreement with WorkSafe.”

“A duty holder can apply for an enforceable undertaking for any contravention of HSWA that may lead to, or has resulted in, a prosecution under the Act,” the policy says.

WorkSafe cannot accept an enforceable undertaking in instances of “reckless conduct in respect of duty”, and it’s unlikely it could do so in the event of a workplace fatality.

The policy lists among factors to take into account: the seriousness of the incident, any mitigation action the duty holder has taken or plans to take, and the duty holder’s compliance record.

In the case of Fletcher Construction, [WorkSafe](#) considered that the company’s proposed actions would: “provide long-term sustainable health and safety improvements in the workplace, industry, and community”.

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