



Fairness in enforceable undertakings: Comparing stakeholder voices[☆]



Gabrielle Jess^{a,*}, Robin Price^{a,b}

^a Queensland University of Technology (QUT) Business School, Management, 2 George Street, Brisbane, QLD 4000, Australia

^b School of Business and Law, CQ University, Brisbane Campus, 160 Ann Street, Brisbane, QLD 4000, Australia

ARTICLE INFO

Article history:

Received 17 June 2016

Received in revised form 30 November 2016

Accepted 29 December 2016

Keywords:

Enforceable undertakings
Distributive justice
Procedural justice
Interactional justice
Work health and safety

ABSTRACT

Serious breaches of the workplace health and safety legislation resulting in a workplace injury can lead to business prosecution. In line with recent shifts in Australian work health and safety prosecutions, alternatively offending businesses may offer an enforceable undertaking. Combining evaluation criteria associated with distributive, procedural and interactional justice, this article considers three key stakeholder groups' fairness perceptions of the enforceable undertaking process in the state of Queensland: the regulator, the offending entity and the injured worker. Comparative analysis of multiple stakeholder voices, reveal that they experience different fairness perceptions across the justice types. The regulator intends enforceable undertakings as a penalty, consistent with intent to prosecute. Offending businesses experience enforceable undertakings as distributively unjust financially, but procedurally just. On balance, business entities preferred undertakings because they offered protection from a criminal record and therefore protected the organisation's perceived competitive position to tender for contracts. For the injured workers, the ability for voice in the enforceable undertaking process needs to be carefully managed so that their voices are not only listened to, but also responded to.

© 2016 Published by Elsevier Ltd.

1. Introduction

The value of prosecution as a deterrent for breaches of health and safety legislation is contested (Schofield et al., 2014). This article explores the value of Enforceable Undertakings (EUs) as an enforcement tool for serious breaches of Work Health and Safety 1995 (WHS) legislation in Queensland, Australia. EUs are: 'a contract involving commitment by a person (an obligation holder) who is alleged to have breached their obligations under the [WHS] Act to do something, which if not done, is enforceable in court' (DEIR, 2008: 2). While EUs have been used as an enforcement tool from 1993 in the consumer protection environment, they have since been adopted more widely across Australian federal and state regulatory authorities (Johnstone and King, 2008: 281). Yet we know relatively little of their effectiveness in the workplace health and safety environment. The use of EUs in the Work Health and Safety (WHS) context commenced with the Queensland regulator, Workplace Health and Safety Queensland (WHSQ) in 2003 (Johnstone, 2009) and was transferred to the national sphere with the harmonisation of WHS across most states

in Australia in 2012. This article explores the experience of EUs as an alternative to prosecution from the perspectives of three stakeholders to an EU: the regulator, regulated business entities and the injured worker (the affected third party) prior to harmonisation in 2012.

Regulation is intended to shape compliance with the law and address offending behaviour through a mix of enforcement sanctions. There are ongoing debates between regulators about the effectiveness of a deterrence approach, such as large fines, compared to a compliance approach, associated with encouraging companies to change their behaviours (Schofield et al., 2014). In the WHS arena, Australian regulators 'have overwhelmingly adopted a compliance approach' and been criticised for doing so (Schofield et al., 2014: 711). EUs are regarded as a medium level sanction within the WHSQ enforcement options (DEIR, 2008) and operate as an alternative to a court prosecution. An EU is a regulator enforced sanction that is considered on the merits of the application. In deciding whether or not an EU is the most appropriate enforcement option, the regulator looks at a wide range of factors: the objective gravity of the alleged offence; the culpability of the business; the offender's prior sanctions and compliance history; the underpinning enforcement principles of WHSQ; and, the expected effect of the enforcement action to act as a deterrent and encourage future compliance behaviour (DEIR, 2008: 3–6). Usually EUs are associated with incidents that involve grievous

[☆] This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

* Corresponding author.

E-mail addresses: gabrielle.jess@hdr.qut.edu.au, g.jess@qut.edu.au (G. Jess), r.price@cqu.edu.au (R. Price).

bodily harm – the loss of a distinct part or organ of the body, serious disfigurement, or any bodily injury that if it remained untreated has the potential to endanger life or cause permanent injury to health (Criminal Code 1899 (Qld)). An EU is not an enforcement option where an allegation of ‘aggravation causing death’ has occurred (DEIR, 2008: 5). A failure to complete an EU will be regarded as a breach and court orders may be sought to secure compliance (DEIR, 2008: 11). The aim of EUs is ‘to promote occupational health and safety’ and for the offending entity to carry out ‘serious organisational reform to implement effective management systems’ (DEIR, 2008: 2). The choice to propose an EU rests with the offending entity and they have sole ownership of the agreement’s contents. Notably though, opting for an EU in place of a prosecution exempts the obligation holder from the recording of a conviction (OIR, 2016: 3).

The literature reports numerous benefits of EUs. Parker (2003: 7–8) points to regulators’ ability to directly engage with the offending entity in order to ‘try and genuinely fix the problem’ as well as the sanction’s flexibility to allow ‘innovative, expansive and preventative remedies’ that cannot be accommodated through court orders. Additionally, EUs can be managed more quickly, cheaply and with greater predictability than legal proceedings and can institutionalise a strong safety culture (Parker, 2003: 7–8). One real advantage is the ability to individualise the regulatory response directly to the problem experienced by an individual business (Yeung, 2004: 186–187). There are also benefits for taxpayers as the cost burden of the EU is shifted to the offending entity (Nehme, 2005: 68).

As an EU involves bilateral arrangements between the regulator and the offending obligation holder, the regulator has discretionary powers to make decisions to the exclusion of the court (Yeung, 2004). These two-way deliberations between the regulator and the offending entity are closed to public scrutiny, and while subject to administrative law requirements, depart from formal procedural safeguards applied to litigation (Yeung, 2004: 185–186). Specifically, unlike the court system, the decision-maker is not required to publicly disclose its reasoning for a decision (Yeung, 2004: 185). During the negotiations and preparation of an EU, public disclosure is not expected of the regulator in its dealings with the regulated community. It is argued that this exposes regulated entities to potential abuse as they may be: ‘coerced’ and ‘unduly pressured’ (Yeung, 2004: 186), or ‘arm twisted’ and ‘bullied’ (Parker, 2003: 15) into agreeing to an EU that may be unfair and disproportionate to both the breach and the conduct (Yeung, 2004: 187). These allegations of unfair treatment remain untested, as a key incentive for such an agreement is the avoidance of formal legal processes (Yeung, 2004: 186).

Consistent with recommendations in other legal forums, steps have been taken to ensure justice in the EU process. Best practice is supported in ‘constitutional principles’ of accountability, proportionality and procedural fairness (Yeung, 2004: 37). Research shows that the fairness of regulatory actions can be enhanced by: publishing EU policy guidelines (ALRC, 2002: 587), publicly disclosing EUs content, structuring the EU so it bears a direct relationship with the alleged breach, and by making EUs proportionate to the alleged breach (ALRC, 2002: 600–601). Moreover, to increase transparency, the inclusion of other parties, such as affected third parties (like employees or community members) is recommended (ALRC, 2002: 610), a recommendation that has the support of other scholars (Parker, 2003: 17; Johnstone and King, 2008: 312). Offering voice to third parties, allows for multiple stakeholder views to be heard (Yeung, 2004: 186) and their interests to be taken into account (Nehme, 2009: 88; Parker, 2003: 17).

While research on EUs has extended knowledge of their use in the consumer and financial context, their use and effectiveness in the WHS context is underdeveloped, a fact acknowledged by the

peak policy body responsible for WHS (Safe Work Australia, 2013: 41). Johnstone and King (2008) have produced the only research on WHS EUs that could be located. Using documentary analysis and interviews with WHSQ and EU applicants, private auditors and lawyers, Johnstone and King (2008) found that of the 65 applications submitted from 2003 to February 2007, 31 applications had been accepted, 21 were rejected and 13 withdrawn. The monetary value of an EU made by duty holders was found to be more than six times the dollar value of the maximum possible penalty for the alleged breach if it was successfully prosecuted (Johnstone and King, 2008: 309). Their study is valuable as the first to examine the EU regulatory process and the costs for businesses; however, the research overlooked the views of the affected third parties and was a preliminary collection of data on the program’s first years of implementation. Extant studies have yet to combine the tripartite voices of the regulator, the regulated entity and affected third parties and document their experience of the EU process in the WHS environment. Having limited evidence-based data on the EU sanction in WHS, and with the harmonisation of WHS legislation across all Australian jurisdictions in 2012, which incorporates EUs into the national legislative framework (Safe Work Australia, 2011), it is timely to examine stakeholder perspectives on the sanction.

This article reports the perspectives of the three stakeholder groups – the regulator, the regulated entity and the injured worker – on the fairness of EUs as an intervention strategy. The first section of the article reviews the literature on organisational justice and establishes a justice framework. The second section provides the results in the form of the voices of each stakeholder group to the EU process. Following this, the third section discusses the findings and makes suggestions for changes to the process of making EUs and recommendations for future research before concluding.

2. Literature review

2.1. Justice framework

This analysis is informed by a justice framework. In the business and management disciplines, scholars draw on the social-psychological theories of justice to investigate the motivations behind people’s need for justice. Justice is defined as individual’s judgements about the principles or criteria they use to describe what they subjectively consider to be fair or unfair in settings. In adopting this approach, justice is defined phenomenologically; when a person judges an act to be fair or unfair, it will be perceived and responded to accordingly (Folger and Cropanzano, 1998: xiv). The framework applied here incorporates three justice dimensions: distributive, procedural and interactional justice. Each justice type is explained in the following section.

2.2. Distributive justice

The earliest form of justice identified in the literature is distributive justice. Distributive justice is concerned with people’s perceptions of the fairness of the outcomes they receive (Cropanzano and Greenberg, 1997: 7) as part of an allocation process. One rule of distributive justice is Adams (1963) equity theory. Adams proposed that people look at the inputs they make in the workplace and the outcomes they receive and consider this ratio against the inputs and outcomes of a ‘comparison other’ (1963: 422–423). The equity rule focuses on *proportionality* and people’s evaluation of their outcomes with respect to the outcomes of others. Outcomes are judged by individuals as fair when their outcome is equal to the outcome of some ‘referent other’. Later Deutsch (1975: 143) introduced two rules alongside the equity

Download English Version:

<https://daneshyari.com/en/article/4981229>

Download Persian Version:

<https://daneshyari.com/article/4981229>

[Daneshyari.com](https://daneshyari.com)