Fairness in enforceable undertakings: Comparing stakeholder voices

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\textbf{A B S T R A C T}

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.

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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 accomplished 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 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 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
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