



DISCUSSION PAPER – ENFORCEABLE UNDERTAKINGS DRAFT GUIDELINES

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WHAT IS THE AIM OF THIS PAPER?

This discussion paper introduces enforceable undertakings, explains their intended role and what their application seeks to achieve.

The paper presents draft Guidelines for the application of enforceable undertakings. Comment on any aspect of the draft Guidelines is encouraged.¹

This paper also sets out the governance structure for enforceable undertakings.

VICTORIA'S ENFORCEMENT REGIME UNDER THE ENVIRONMENT PROTECTION ACT 1970

An enforcement regime to protect the environment has two key objectives. These are to:

1. *punish* offenders for polluting Victoria's environment
2. promote *behavioural change*, encouraging offenders to not partake in the polluting behaviour again, and deterring others within the community from engaging in the unwanted behaviour.

The suite of enforcement measures available to the Authority has evolved over time, responding to community expectations regarding protection of the environment. For example, recognising that financial penalties alone are not always a strong enough incentive to change corporate behaviour, alternative sentences were introduced into the Act in 2002. This power enables a court to order a non-financial penalty, which can include undertaking specific environmental projects and, importantly, to publicise the offence and consequences in media such as newspapers and annual reports.

The power of publicity can have an impact far more substantive than a financial penalty alone and these instruments have sent powerful signals to industry that polluting the environment can no longer be considered a normal cost of doing business.

While each enforcement instrument has a critical role as a part of a suite of powers, one issue that those tools cannot address is systemic problems in a corporation that may be the cause of the original pollution incident.

In an effort to fill this gap, Parliament introduced a new enforcement tool into the Act. The new tool is called an enforceable undertaking.

WHAT ARE ENFORCEABLE UNDERTAKINGS?

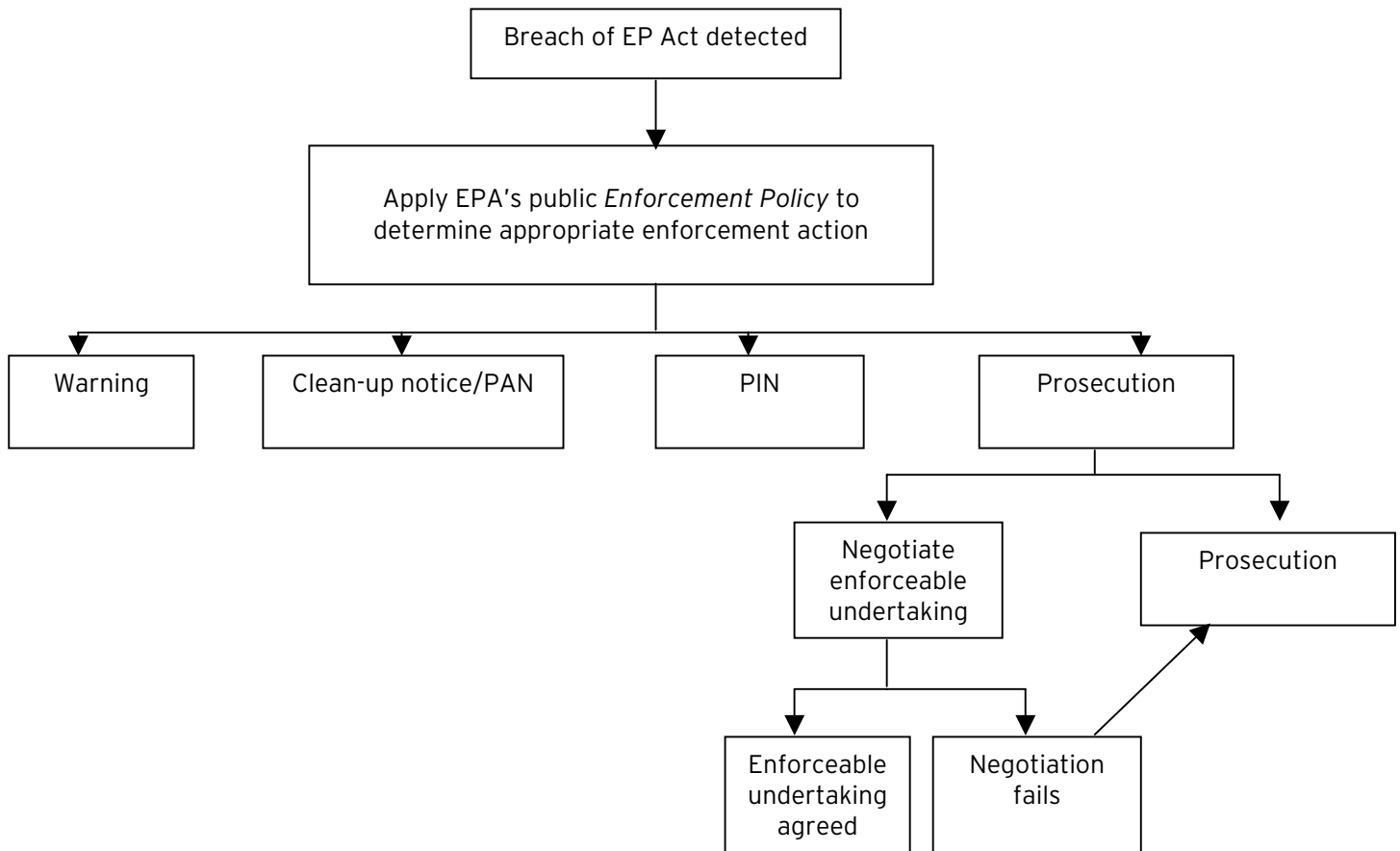
The term 'enforceable undertaking' describes a voluntary, negotiated written promise or set of promises in which a party undertakes to perform various tasks as a part of a settlement for alleged contravention of the Act. An enforceable undertaking will be an enforcement option applied in appropriate circumstances in lieu of court prosecution. The diagram below indicates where enforceable undertakings fit into the enforcement regime.

The capacity to agree on an undertaking in response to a breach of the Act will enable efficient and effective resolution of some issues without the need for costly and time-consuming court proceedings.

Importantly, enforceable undertakings provide an opportunity for the Authority to require that a company put in place mechanisms that may prevent future breaches of the Act, promoting behavioural changes in a proactive manner. For example, if a company has a smoky vehicle in their fleet, an enforceable undertaking may require the company to conduct an audit of all vehicles in the fleet to ensure no further breaches occur. Similarly, a company that breaches a licence condition may be required to develop and implement an environment management system to prevent future breaches.

The capacity to seek court intervention in the event that an undertaking is breached is an integral mechanism to ensure a robust and effective enforcement system.

¹ Appendix 1 to the *Enforcement Policy* is attached to the draft guidelines for reference only. Appendix 1 and the *Enforcement Policy* generally are not under review as part of this discussion paper.



Enforceable undertakings are not a new concept in law; however, they are still in their infancy with respect to their application in an environmental law context.

Consumer protection bodies, such as the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission, have been using enforceable undertakings for some time. In Victoria, enforceable undertakings have been introduced into the *Occupational Health and Safety Act 2004*. The New South Wales Government has introduced enforceable undertakings into the *Protection of the Environment Operations Act 1997*.

APPLICATION OF ENFORCEABLE UNDERTAKINGS

While enforceable undertakings enable a flexible response to breaches of the Act, it is important to note that flexibility is not tantamount to leniency. Breaching the Act can be a criminal offence, and enforceable undertakings should in no way be seen as a 'soft option'. The Authority will not enter into undertakings lightly and it is not a measure that will be considered

appropriate in all circumstances. The Authority will consider accepting an enforceable undertaking as an alternative to prosecution where it is likely to achieve a more effective outcome and where, on consideration of the circumstances relating to the offence, it is seen as an appropriate measure.

Enforceable undertakings have great potential to deliver significant benefits to the Victorian environment. Ensuring community and industry confidence in the application of this tool is of utmost importance.

In an effort to ensure community and industry confidence in this enforcement tool, transparent decision-making criteria and robust governance arrangements will be in place.

Transparent decision-making criteria

A key mechanism through which transparent decision-making criteria will be delivered is through public Guidelines. The Act requires that the Authority consider criteria specified in Guidelines when determining whether an undertaking is an appropriate enforcement mechanism (section 70D).

In developing draft Guidelines the Authority has considered the experience of other applications of an enforceable undertaking tool. While the Act does not require a public consultation process for the development of the Guidelines, the Authority believes that this consultation process is an important way to ensure that the Guidelines are meaningful for those in the community for whom they will be a resource.

The Authority has a public *Enforcement Policy*, which details the enforcement measures available to the Authority and factors to be considered when selecting an appropriate action. Enforceable undertakings will be applied in the context of the transparent enforcement hierarchy that the Authority employs when making enforcement decisions.

The Guidelines, which provide an additional level of detail about the application of enforceable undertakings, will be published as an appendix to the *Enforcement Policy*.

The Guidelines provide clear context for the role of enforceable undertakings and when the Authority will consider them appropriate. It outlines:

- the minimum content of an undertaking
- the process of their development
- what happens when an undertaking is breached
- how undertakings will need to be monitored
- publicity requirements.

Comment on the draft Guidelines is now being sought.

When considering the draft Guidelines, the following questions may be useful:

Question: Do the draft Guidelines provide clarity about what an enforceable undertaking is and when it would be considered to be appropriate by the Authority?

Question: Is the content and the process of developing an enforceable undertaking sufficiently clear?

Question: Is the process for monitoring and enforcing enforceable undertakings sufficiently clear?

Robust governance arrangements

EPA proposes to appoint an independent Advisory Panel of three or four people under the Act. Part of the panel's role will be to advise the Authority on the appropriateness of proposed enforceable undertakings.

Panel selection will be on a skills basis rather than on a representative basis. While not a comprehensive list, some relevant skills would include scientific skills relevant to the environment and pollution, legal and investigative skills, and skills in social and community understanding. It is anticipated that that this panel will provide advice to the Authority on the suitability of a proposed enforceable undertaking. This advice will be

taken into consideration by the Authority in making a decision to accept or reject an enforceable undertaking.

It is important to note that, while the Advisory Panel will play an important role in providing additional governance over the application of the tool, the Panel in no way subverts the Authority's decision-making capacity. The Authority, as an independent environmental regulator, has responsibility for enforcement decisions. The Panel's advice will be an important input, but will not bind the Authority.

The Authority invites expressions of interest from parties interested in forming the Advisory Panel. Please send your details, including CV and a statement outlining your relevant skills and suitability for the panel, to EPA via the email address below.

Question: Do you have any comments about the role or make-up of the Advisory Panel?

WE ARE SEEKING YOUR COMMENTS

Comments, queries or expression of interest can be submitted via email to:

<mailto:enforceable.undertakings@epa.vic.gov.au>

Comments are to be received by close of business on Friday, 26 September 2008.

Should you require any additional information, please email the above address or direct inquiries to:

Environment Protection Authority, 03 9695 2722

You should also note that all submissions are subject to EPA's submissions publication policy and may be made publicly available via the internet during and after the close of the public comment period.