



ENFORCEABLE UNDERTAKINGS: DRAFT GUIDELINES

Publication 1244 August 2008

An enforceable undertaking is a binding agreement between a person and the Authority where the person undertakes to carry out certain activities in connection with a matter relating to a breach or alleged breach of the Act or regulations. As an alternative enforcement tool to prosecution it provides an efficient, transparent and flexible resolution to an alleged offence, enabling a range of outcomes to be achieved through a single remedy.

This attachment provides guidance on the use of enforceable undertakings by EPA. This document forms part of the *Enforcement Policy* and constitutes guidelines for the purpose of Section 67F of the Act.

Context

Section 67D of the Act allows the Authority to enter into enforceable undertakings in relation to a breach or alleged breach of the Act or regulations.

Enforceable undertakings are one of EPA's most flexible and effective remedies to enforce and improve compliance with the law.

Once an enforceable undertaking is entered into and while it remains in force, the Authority cannot prosecute that person or subject them to penalty infringement notices for the conduct to which the undertaking relates. Failure to comply with an enforceable undertaking may, however, result in legal action to enforce the undertaking.

When will the Authority enter into an enforceable undertaking?

The Authority will consider accepting an enforceable undertaking as an alternative to prosecution where it is likely to achieve a more effective outcome and, considering the alleged breach and the surrounding circumstances, it is considered an appropriate measure.

As with any enforcement activity, the Authority will first consider the factors listed in Appendix 1 to determine whether enforcement action is appropriate and, if so, which enforcement tool to use. The Authority does not consider enforceable undertakings to be a 'soft option' and will not enter into such undertakings lightly. Additionally, such an enforcement measure is not considered appropriate in all circumstances.

A distinguishing feature of an enforceable undertaking, when compared to other enforcement options available to the Authority, is the capacity to

tailor the agreement to address the conduct in question. The key objective of an enforceable undertaking is to implement systemic change in an organisation to prevent future breaches of the Act and regulations. The potential for an undertaking to achieve this is of primary importance when considering use of this enforcement option, to ensure that the best possible environmental outcome is achieved.

Previous use of an enforceable undertaking should not be regarded as binding precedent for future acceptance or future Authority action.

Initiating an enforceable undertaking

A person who has breached or allegedly breached the Act or regulations can initiate an enforceable undertaking through discussion with the Authority. The Authority may consider an offer of an enforceable undertaking up until it has made a decision on the outcome of an investigation.

The Authority does not have the power to require a person to enter into an enforceable undertaking. Similarly a person cannot compel the Authority to accept an enforceable undertaking. However, the Authority can suggest to an offender that it may consider an enforceable undertaking, while emphasising that such a suggestion does not bind the Authority to accept any enforceable undertaking offered.

If such a suggestion is made, the procedures in place to determine whether an offer of enforceable undertaking is accepted should be outlined. Any such proposal or suggestion of an enforceable undertaking should not be made at the outset of an investigation and will not curtail the process of investigation.

Responsibility for development and negotiation of the enforceable undertaking will be assigned to officers independent of the investigation of the offence.

The person offering the enforceable undertaking is expected to finalise any offer in a timely manner.

Acceptance of enforceable undertakings

The Authority's consideration of the offer will include referral to the Authority's internal Enforcement Review Panel. This Panel makes recommendations about enforcement action and the Panel will provide advice to the Authority on enforceable undertakings.

The offer will also be referred to an independent advisory panel¹ for consideration. This panel includes persons independent of the Authority and includes skills such as social and community understanding, as well as legal, investigative and environmental skills. The Authority will consider the advice of this panel when making a decision on whether to accept an enforceable undertaking.

The responsibility for accepting or rejecting an offer of an enforceable undertaking ultimately rests with the Authority.

Decisions on enforceable undertakings will be made in an expeditious manner and provided in writing to the person making the offer. The undertaking comes into effect from the date it is signed by the Authority. Where an offer of an enforceable undertaking is rejected, the written advice will include the reasons for the decision.

The person offering the undertaking must agree to and sign the undertaking and, where that person is a company, the CEO or chair of the board of directors or appropriate delegate must sign it.

Content of enforceable undertakings

Enforceable undertakings are the subject of discussions between the Authority and the party concerned as to appropriate elements and content the Authority is prepared to accept. Obligations in the undertaking must be reasonable, clearly expressed and have not been procured unfairly. While recognising that there is no fixed formula and that undertakings will be tailored to particular circumstances, an enforceable undertaking will include:

- details of the conduct which led to the undertaking
- clear measurable actions
- timelines for achieving such actions
- a means of independent monitoring and auditing of the actions
- reporting requirements to the Authority on implementation and completion
- acknowledgement that an undertaking will appear on the public record and will remain on such a record upon completion of all obligations under the undertaking
- an outline of the effect of failing to comply with the undertaking
- a termination date for the undertaking.

Enforceable undertakings must include a commitment that the person will stop the particular conduct or alleged breach that led to the undertaking, and not recommence that conduct.

An enforceable undertaking must acknowledge that the undertaking will appear on a public register and may receive other forms of publicity by the Authority.

As the key objective of enforceable undertakings is to promote systemic change that will prevent future breaches of the Act, an enforceable undertaking may comprise of commitments to:

- cease certain behaviour or forms of conduct
- investigate and provide a written report regarding the circumstances leading to any alleged breach. Identify any failings in the organisation's systems or management
- formulate specified actions, programs or strategies to prevent future breaches (e.g., systems, procedures, guidelines, awareness or research)
- nominate an officer, with appropriate senior management reporting structures, to oversee compliance
- undertake works to reduce the environmental impact or hazard associated with the operation of any part of the company's operation
- provide statements of commitment from senior management that it will support compliance programs
- implement publicity or educative programs (e.g., public apology)
- carry out specific projects for the restoration or enhancement of the environment in the nature of community service.

It is important to note that the above are examples only and should in no way limit the scope of particular enforceable undertakings. In order to be effective and to achieve their intended purpose, it is important that enforceable undertakings provide a flexible and tailored solution to address breaches of the Act or regulations.

Unacceptable content

An enforceable undertaking will not be accepted if it:

- contains a denial of responsibility or liability for the offence/alleged offence
- or
- does not include details of the conduct which gave rise to the enforceable undertaking and to the Authority's concerns about the conduct
- or
- contains any clauses that set up defences for possible non-compliance with the undertaking.

Publicity and public access

The Authority will not accept enforceable undertakings in confidence.

¹ A statutory panel established under section 13(h) of the *Environment Protection Act 1970*.

The Authority considers that enforceable undertakings are matters for the public record in the same way as the outcomes of court actions. For this reason the Authority will maintain a register of enforceable undertakings open for public inspection. This register will also be made available through the EPA website. This register will be maintained in accordance with the *Information Privacy Act 2000*.

The Authority will also make publicly available any report received on compliance with the enforceable undertaking.

In addition to the public register, the Authority may publicise enforceable undertakings in news media statements, reports, publications and in any other manner considered appropriate.

A person entering into an enforceable undertaking may undertake publicity as part of the actions in the undertaking and will need to acknowledge in the undertaking awareness and acceptance of the Authority's approach (as outlined above) on publicity and public access.

While an undertaking will have an agreed life during which all obligations must be completed, the Authority will not remove an enforceable undertaking from the register, even after all the obligations under the undertaking have been fulfilled. The fact that an enforceable undertaking was accepted should remain on the public record, and the register should remain a complete record of the Authority's use of this enforcement tool.

Monitoring the enforceable undertaking

Monitoring and reporting requirements will be clearly outlined in each undertaking.

A person entering into an enforceable undertaking must comply with the terms of that undertaking and will need to demonstrate and report progress to the Authority, as required. This may include conducting an independent audit of remedial or compliance actions at their cost.

An EPA officer will be assigned to monitor implementation of an enforceable undertaking and will report to the Authority on the outcome of this.

Failure to comply with an enforceable undertaking

If the Authority believes a person has not complied with any aspect of an enforceable undertaking, it may pursue legal action through the Magistrate's court.

The legislation outlines that, where a party has breached the terms of an enforceable undertaking the Court may order that person to:

- comply with a term of the undertaking
- or
- take specified action to comply with the undertaking.

The Court may also make any other order it considers appropriate.

If a person fails to comply with a court order, the Authority may, under section 67E of the Act, give the person written notice advising that the Authority intends to carry out specified actions outstanding under the order. If the person on whom the notice has been served fails to satisfy the Authority within 14 days that it will comply with the court order, the Authority may publicise the failure to comply with the order and carry out those actions. The Authority may recover, as a debt due, any reasonable costs incurred by the Authority, payable by the person against whom the court order had been made.

In addition, where a party fails to comply with an order of the court, the Authority may initiate contempt of court proceedings against the person. Contempt of court is a serious matter and can attract severe criminal sanctions. If a person is found to be in contempt of court, a fine or a period of imprisonment may be imposed by the court.

If a person is found in contempt of court for failing to comply with an order, the Authority may do anything necessary or expedient to complete the order. Again, the Authority may recover any reasonable cost incurred in completing the order as a debt due and payable by the person.

The Authority will publicise the failure to comply with an enforceable undertaking or an order of the court in news media statements, reports, publications and in any other manner considered appropriate.

Costs

In the same way that courts may order costs in a prosecution for expenses incurred by the Authority, such as scientific analysis of samples under section 66C of the Act, the Authority may accept cost recovery as part of an undertaking. It is envisaged that only costs additional to the Authority's core business may be recovered in this manner.

Variations and withdrawals

With the consent of the Authority, a person may vary or withdraw an enforceable undertaking under section 67D(3) of the Act. The Authority will only consider requests for variations where it would not alter the spirit of the original undertaking, and where there has been a material change in circumstances or if compliance with the terms of the undertaking is later found to be impractical – for example, if a company's financial circumstances changed such that they were no longer able to fulfil the requirements of the undertaking.

Variations and withdrawals will be included in the public register available for inspection.

In exceptional circumstances, the Authority may allow a party to withdraw an enforceable undertaking after



ENFORCEABLE UNDERTAKINGS: DRAFT GUIDELINES

it has been accepted. If the Authority consents to the withdrawal, the party is no longer bound by the terms of the undertaking.

Where a withdrawal has been accepted, the Authority may take legal action in regards to the original offence or offences to which the enforceable undertaking relates.

Requests for variations or withdrawals should be made to the Authority.



APPENDIX 1

Enforcement measures – factors to consider

- The seriousness of the offence due to the harm or potential harm to the environment.
- The culpability of the offender, whether it be a corporation or employee, including mitigating or aggravating circumstances.
- The previous history of the offender and whether enforcement measures are necessary to ensure compliance with the Act and regulations.
- The prevalence of the offence, the public concern generated and the need for deterrence, both specific and general.
- The cost of enforcement and whether enforcement proceedings may be counterproductive.
- The precedent that may be set by any failure to take enforcement action.
- The length of time since the offence and the likely outcome of enforcement proceedings.
- The cooperation given to EPA and whether enforcement measures have been taken against others out of the same incident.