



# Victoria Government Gazette

No. S 142 Tuesday 1 May 2012  
By Authority of Victorian Government Printer

## Environment Protection Act 1970

### ENFORCEABLE UNDERTAKINGS GUIDELINES

Notice is given in accordance with section 67F of the **Environment Protection Act 1970** of the revision of the Enforceable Undertakings Guidelines.

An enforceable undertaking is a binding agreement between a person and the Environment Protection Authority. By entering the agreement, the person undertakes to carry out certain activities in connection with the matter relating to a breach or alleged breach of the **Environment Protection Act 1970** 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.

A copy of the Guidelines can be obtained by visiting EPA's website, [www.epa.vic.gov.au](http://www.epa.vic.gov.au) or by contacting EPA on 1300 EPA VIC (1300 372 842) or by visiting EPA's head office at 200 Victoria Street, Carlton 3053.

### ENFORCEABLE UNDERTAKINGS GUIDELINES

#### Purpose of this guideline

The purpose of this guideline is to explain to Victorian businesses and the community how EPA may use enforceable undertakings as an alternative to prosecution when an alleged breach of the **Environment Protection Act 1970** (EP Act) or other legislation administered by EPA has occurred.

EPA makes these guidelines under section 67F of the EP Act and it supplements information in EPA's Compliance and Enforcement Policy.

As stated in the Compliance and Enforcement Policy, 'EPA aims to be an effective regulator and an influential authority on environmental impacts that also exercises its statutory authority fairly and credibly.'

This guideline explains:

- what an enforceable undertaking is and what it must achieve;
- the process for developing an enforceable undertaking; and
- how compliance with enforceable undertakings is enforced.

#### What are enforceable undertakings?

An enforceable undertaking is a constructive alternative to prosecution. It allows an alleged offender to voluntarily enter into a binding agreement to undertake tasks to settle an alleged contravention of the law and remedy the harm caused to the environment and the community.

EPA will only accept an enforceable undertaking where:

1. the person or organisation ('the Offender') takes active responsibility for the offence and its impacts; and
2. it is the most appropriate form of enforcement response and will achieve a more effective and long-term environmental outcome than prosecution.

EPA considers that enforceable undertakings are not appropriate where any of the following circumstances exist:

1. serious breaches of the EP Act involving high or serious levels of culpability
2. multiple serious breaches or systemic failures
3. significant incidents involving considerable public interest requiring a transparent hearing in court
4. applicants have been the subject of previous prosecutions of a serious nature
5. EPA cannot be satisfied of ongoing compliance.

Enforceable undertakings can be enforced through the courts if the actions committed to are not delivered in accordance with the terms of the undertaking.

**SPECIAL**

**What are the key objectives of enforceable undertakings?**

Enforceable undertakings must achieve several key objectives. These objectives, and the degree to which a proposed undertaking will deliver them, form the basis for EPA's decision whether or not to accept an offer of an enforceable undertaking made by an Offender. All objectives should be addressed in each enforceable undertaking offer.

The key objectives of enforceable undertakings are explained below:

**1. Undertakings must drive improvement in environmental performance****a. Fix the problem that led to the alleged breach:**

The enforceable undertaking must identify failings in the Offender's systems and/or management that led to the alleged breach of the EP Act, and make commitments to address these failings.

It is a standard requirement of all enforceable undertakings that an Environment Management System (EMS) is developed (which must be assessed by an appropriate person as a part of the commitment). If an EMS is already in place, the Undertaking must include a commitment to have that EMS audited and amended as necessary.

In addition, commitments to address the alleged breach may also include:

- creating or amending operational procedures and guidelines
- implementing upgrades to plant or equipment
- raising employee awareness through information and training
- implementing senior management reporting structures to oversee compliance.

The Offender must, at a minimum, aim to meet industry best practice, and should ideally aim to raise that standard.

**b. Innovate for improved environmental performance**

Committing to actions that ensure future compliance with the EP Act is not enough to constitute an enforceable undertaking. All Victorians are required to comply with the EP Act. An enforceable undertaking is an alternative to prosecution and as such, the Offender is required to demonstrate through the commitments it makes, that it is:

- serious about improving on-site environmental performance beyond compliance;
- approaching their environmental obligations in a proactive manner; and
- where possible identifying innovative solutions to environmental issues.

Examples of actions that may demonstrate a commitment to improving environmental performance beyond compliance include:

- investing resources into researching and trialling new technology
- installing new infrastructure that will minimise the risk of future pollution events
- CEO/Executive Director or similarly senior employee commitment to undergo training in environmental sustainability.

**2. Undertakings should deliver benefit to the local environment and community**

An enforceable undertaking should deliver a tangible benefit to the quality of our environment, and to the community that has been directly affected by the alleged offence, e.g. through a financial contribution to a project that will improve the local environment or to a local environment group.

Prior to submitting an offer of an enforceable undertaking, the Offender must consult with communities and any relevant agencies affected by the alleged breach to discuss how:

- the affected environment can be improved;
- the Offender can contribute to such improvement; and
- environmental performance of the Offender can be improved.

Outcomes of the above community consultation, as well as a commitment to ongoing community engagement where appropriate, must be reflected in the proposed enforceable undertaking commitments.

The Offender will be required to demonstrate to EPA in the 'Scope of Enforceable Undertaking' document that they submit, that affected communities have been identified and appropriately engaged in the development of the enforceable undertaking offer.

EPA's Strategic Partnerships Unit can provide more information on EPA's expectations with respect to community engagement for enforceable undertakings. Additional information can also be found on EPA's website.

### **3. Undertakings should drive improvements in environmental performance industry wide**

An enforceable undertaking should seek to improve the environmental performance of others within the industry. Often issues experienced by one Offender are also experienced by others within the same industry, and a significant gain for the environment can be made by the Offender sharing experiences.

Prior to submitting an enforceable undertaking offer, the Offender should assess how its actions may have affected others within the industry, what the Offender has learnt from the incident and how it can use the implementation and outcomes of the enforceable undertaking to assist in improving the environmental performance of others within the industry.

For example, this may be achieved through:

- sharing the outcomes of research;
- actively engaging in industry forums to communicate the objectives of the enforceable undertaking and knowledge gained through complying with its terms; and/or
- educating other businesses and assisting them to implement similar process or infrastructure changes.

#### **Additional requirements of enforceable undertakings**

**In addition to delivering the 'key objectives', enforceable undertakings must address the following requirements:**

##### **1. Commitments relating to monitoring and reporting**

Monitoring and reporting requirements must be clearly outlined in each enforceable undertaking.

The Offender must commit to providing EPA with interim progress reports (at intervals to be negotiated) and also a final compliance report.

The detail of what is required in each interim progress report will be negotiated through the development of the enforceable undertaking.

The Offender must commit to engaging, at its own cost, an Auditor to review the Offender's compliance with the terms of the enforceable undertaking and to write a 'final assessment report' outlining each undertaking and providing the Auditor's professional assessment of the Offender's compliance. A copy of this report must be submitted to EPA.

The Offender must also commit that, upon its satisfaction that all undertakings have been implemented, it will provide to EPA a certification from its CEO (or equivalent) that the Offender has fully completed all undertakings.

EPA will assign an officer to receive interim progress and final compliance reports and to monitor that the enforceable undertaking is being appropriately implemented. Once the enforceable undertaking has been completed EPA will send a letter, signed by the CEO, to the Offender advising that the Undertaking is no longer in force.

**2. Indicative compliance costs**

In order to ensure transparency and accountability, the Offender is required to include an estimated cost of complying with the enforceable undertaking – i.e. how much it will cost the Offender to implement the commitments.

This cost estimate should be broken down such that it describes the cost of implementing commitments that will:

- drive improvement in the Offender's environmental performance by fixing the problem that led to the alleged breach;
- drive improvement in the Offender's environmental performance by innovating for improved environmental performance;
- deliver benefit to the local area/environment that was affected by the alleged breach; and
- assist in improving the environmental performance of the relevant industry more broadly.

The Offender will be required to provide EPA with a detailed final cost of compliance at the completion of the enforceable undertaking.

**3. Commitment that the relevant conduct has ceased and will not be recommenced**

One of the primary objectives of enforceable undertakings is to prevent similar incidents from occurring in the future. As a basic requirement of this, an Offender must make a commitment that the relevant conduct that led to the alleged breach has ceased and will not recommence.

EPA highly recommends that a statement of regret be made in an enforceable undertaking offer.

**4. Enforceability**

Enforceable undertakings must clearly articulate measurable actions and timelines for completion that the Offender has committed to.

For example, terms that require elimination or reduction of a pollutant will need to specify performance measures eg: no more than [specify the amount of the pollutant] will be measured in [insert medium] by [insert date].

If the terms of an enforceable undertaking are breached, EPA may pursue enforcement through the Court.

**5. Acknowledgment that Enforceable Undertakings are public**

The EP Act requires that EPA maintain a public register of all enforceable undertakings, which is located on EPA's website. All enforceable undertakings must contain an acknowledgement that the enforceable undertaking will be made public by publication on EPA's website and that the EPA may refer to it in media releases and other publications.

Enforceable undertakings cannot be accepted by EPA in confidence. EPA accepts that there may be exceptional circumstances where it is appropriate that some confidential information or commercially sensitive information be removed from the public versions. However, given that a key objective of enforceable undertakings is to improve the environmental performance of industry more broadly, it is strongly recommended that Offenders do not seek to exclude commitments from publication on the basis of commercial in confidence.

If the Offender does seek to exclude the publication of one or more commitments on the basis of commercial in confidence, the onus is on the Offender to appropriately identify commercially sensitive information when the enforceable undertaking offer is submitted to the Authority. This will enable EPA to make an assessment of whether an enforceable undertaking is appropriate in the circumstances.

**What an Enforceable Undertaking cannot include:**

In addition to considering the factors outlined in the Compliance and Enforcement Policy, an enforceable undertaking will not be accepted if it:

- contains a denial of responsibility or liability for the offence;
- contains any clauses that set up defences for possible non-compliance with the enforceable undertaking;
- does not include details of the conduct which gave rise to the enforceable undertaking and to EPA's concerns about the conduct; or
- simply documents commitments the Offender has already made outside of the proposed enforceable undertaking.

The Offender will be required to make a declaration during the enforceable undertaking development process that the offer does not include expenditure that has already been planned as a part of the Offender's budget.

**When will the Authority consider entering into an Enforceable Undertaking?**

An enforceable undertaking may be considered by EPA at any time up until formal prosecution charges have been laid. Once formal prosecution charges have been laid the matter sits with the court and it is outside the power of EPA to enter into an undertaking.

In considering an enforceable undertaking EPA will consider any co-offenders and their contribution. Acceptance of an enforceable undertaking in relation to one co-offender will not necessarily warrant the same outcome for the co-offenders.

During negotiations pertaining to a potential enforceable undertaking, the prosecution investigation will continue unabated.

While intended to be a speedier resolution of alleged breaches of the Act than court prosecution, enforceable undertaking negotiations do, by their nature, take some time. Offenders should not delay taking proactive action to remedy the issue that led to the alleged breach and engage with the affected community while negotiations are taking place. Proactive action by an Offender is considered favourably by EPA. For example, proactive action may be considered when developing the commitments required in the Enforceable Undertaking, and the resulting compliance costs.

**Process for developing an Enforceable Undertaking**

Each Enforceable Undertaking is an individual document. Therefore the timeframe for the process is variable depending on the environmental issues associated with the offence, the individual Offender and the corresponding considerations committed to in the Enforceable Undertaking. However, each Enforceable Undertaking must be developed in a timely manner.

Step	Who is responsible	What happens						
1	The Offender	Registers their initial interest in an enforceable undertaking in writing with EPA's Manager Major Investigations. The EPA may provide information regarding the option of an Enforceable Undertaking to a potential defendant after an offence has been committed.						
2	EPA Enforcement Review Panel	<p>Assesses the application from the Offender and decides whether an enforceable undertaking is a potentially appropriate enforcement response to the alleged offence.</p> <table border="1"> <thead> <tr> <th>If</th> <th>then</th> </tr> </thead> <tbody> <tr> <td>EPA decides that an enforceable undertaking is a potential option</td> <td>the Offender will be requested to submit a '<i>Scope of Enforceable Undertaking</i>' document.</td> </tr> <tr> <td>EPA decides that an enforceable undertaking is not appropriate</td> <td>the Offender will be advised in writing.</td> </tr> </tbody> </table>	If	then	EPA decides that an enforceable undertaking is a potential option	the Offender will be requested to submit a ' <i>Scope of Enforceable Undertaking</i> ' document.	EPA decides that an enforceable undertaking is not appropriate	the Offender will be advised in writing.
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EPA decides that an enforceable undertaking is not appropriate	the Offender will be advised in writing.							
3	The Offender	<p>Submits the '<i>Scope of Enforceable Undertaking</i>' document to EPA's Legal Services (located on EPA's website).</p> <p>The <i>Scope of Enforceable Undertaking</i> document must include:</p> <ul style="list-style-type: none"> <li>● An outline of the incident</li> <li>● A statement of regret</li> <li>● An outline of who the Offender has identified as the affected community from the incident and a statement of how the interests of affected community members have been considered in the development of the proposed commitments and how the Offender intends to engage with the community moving forward</li> <li>● An outline of the Offender's assessment of how its actions have affected others within the industry, what the Offender has learnt from the incident and how it proposes to use the enforceable undertaking to assist in improving the environmental performance of others within the industry</li> <li>● An outline of proposed key enforceable undertaking commitments</li> <li>● An estimate of compliance costs</li> <li>● A declaration, signed by an authorised representative of the Offender, that the proposed commitments are not a part of the Offender's programed expenditure.</li> </ul>						

Step	Who is responsible	What happens
4	EPA	<p>a. Assesses the adequacy of the <i>Scope of Enforceable Undertaking</i> document and provides feedback to the Offender.</p> <p>b. Advises the Offender to submit a draft offer of an enforceable undertaking using the ‘<i>Enforceable Undertaking Offer</i>’ template (located on EPA’s website).</p> <p>Notes:</p> <ul style="list-style-type: none"> <li>• The draft offer details the commitments the Offender is making, for consideration by EPA.</li> <li>• The Offender may be required to submit a number of drafts to EPA as the detail of the offer is negotiated.</li> </ul>
5	Enforceable Undertakings Panel <sup>1</sup>	<p>Assesses the draft offer and advises EPA on whether or not it is acceptable.</p> <p>The Panel assesses against the following criteria:</p> <ul style="list-style-type: none"> <li>• whether the proposal is an appropriate use of the enforceable undertakings power – considering aspects such as whether the proposal will likely improve the proponent’s future environmental performance;</li> <li>• the likely environmental outcomes; and</li> <li>• the appropriateness of proposed engagement activities.</li> </ul> <p>If requested by EPA, the Panel will also provide advice on:</p> <ul style="list-style-type: none"> <li>• the adequacy of corporate governance arrangements with respect to enforceable undertakings;</li> <li>• whether enforceable undertakings are meeting their intended outcomes; and</li> <li>• any related enforcement/compliance issues.</li> </ul>
6	EPA	<p>Provides the Offender with:</p> <ul style="list-style-type: none"> <li>• feedback from the Enforceable Undertakings Panel and EPA</li> <li>• the opportunity to revise their final enforceable undertaking offer based on this feedback.</li> </ul>
7	The Offender	<p>Submits their final offer to EPA. The common seal of the Offender (if it is a company) must be affixed to this offer in the presence of a Director and a Director/Company Secretary.</p>
8	EPA Enforcement Review Panel	<p>Assesses the final offer and advises EPA’s CEO whether or not it is adequate.</p>
9	EPA’s CEO	<p>Approves or rejects the final offer based on the advice of EPA’s Enforcement Review Panel.</p>

<sup>1</sup> The Enforceable Undertakings Panel is an independent expert panel who advise EPA on whether or not an offer of an enforceable undertaking is acceptable. It is not a decision making body.

**Compliance with Enforceable Undertakings****How are enforceable undertakings monitored?**

An EPA officer will be assigned to monitor implementation of an enforceable undertaking. This officer will co-ordinate the development of a monitoring schedule following EPA's agreement to an undertaking. This monitoring schedule will include scheduled site visits to enable EPA to make an assessment of compliance with the terms of the enforceable undertaking against key milestones throughout the life of the undertaking.

As noted earlier, Offenders will be required to commit to providing interim progress reports as well as a final compliance report. These reports, along with EPA's own inspections and oversight, are used to ensure that the undertaking is meeting its targets and objectives.

**What happens if an Enforceable Undertaking is not complied with?**

Non-compliance with an enforceable undertaking will be reported to EPA's Major Investigations unit, which will decide what action to take.

If EPA believes an Offender has not complied with any aspect of an enforceable undertaking, it may investigate and pursue legal action through the Magistrates' Court.

The EP Act provides that, where a party has breached the terms of an enforceable undertaking, the Court may order that person (Offender) 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 an Offender fails to comply with a court order, EPA may, under section 67E of the EP Act, give the Offender written notice advising that EPA intends to carry out specified actions outstanding under the order. If the Offender on whom the notice has been served fails to satisfy EPA within 14 days that it will comply with the court order, EPA may publicise the failure to comply with the order and carry out those actions. EPA may recover, as a debt due, any reasonable costs incurred by EPA payable by the Offender against whom the court order had been made.

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

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

EPA may 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.

**Enforceable undertakings do not provide an indemnity for other breaches of the Act.**

In accordance with the EP Act, an enforceable undertaking does not provide an Offender with an indemnity for any conduct other than that specifically identified in the Undertaking. The Undertaking will address a specific alleged incident and any other alleged breaches will be considered by EPA in accordance with the EPA's Compliance and Enforcement Policy.

**Additional information****Costs**

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

**Variations and withdrawals**

With the consent of EPA, an Offender may vary or withdraw an accepted enforceable undertaking under section 67D(3) of the Act.

EPA will only consider variations that would not alter the spirit of the original enforceable undertaking, and where there has been a material change in circumstances, or if compliance with the terms of the enforceable undertaking is later found to be impractical.

In exceptional circumstances, EPA may allow an Offender to withdraw an enforceable undertaking after it has been accepted. If EPA consents to a withdrawal, the Offender is no longer bound by the terms of the enforceable undertaking.

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

Requests for variations or withdrawals should be made in writing to EPA.

Variations and withdrawals will be made public in the enforceable undertakings register on the EPA website.

**External Panel**

Whilst not a requirement of the Act, an External Panel has been established by EPA to provide additional governance over the application of this instrument.

The Enforceable Undertakings Panel provides advice to EPA on individual enforceable undertaking offers. Specifically, the Panel provides advice on the following:

- whether the proposal is an appropriate use of the enforceable undertaking power – considering here aspects such as whether the proposal will likely improve the proponent's future environmental performance;
- the likely environmental outcomes; and
- the appropriateness of proposed engagement activities.

If requested, the Panel will also provide advice to EPA on:

- the adequacy of corporate governance arrangements with respect to enforceable undertaking;
- whether enforceable undertakings are meeting their intended outcomes; and
- any related enforcement / compliance issues as requested by EPA.

EPA's CEO will consider the Panel's advice when making a decision on whether or not to accept an offer of an enforceable undertaking. The Panel is not a decision maker – it provides an advisory role only.

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