

Office of Fair Trading

Enforceable undertaking policy & procedure

2023



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1 Overview and purpose

Enforceable undertakings are written undertakings (or deeds) created to resolve breaches of specific legislation administered by the Office of Fair Trading (OFT). Some legislation administered by the OFT allows for enforceable undertakings as an enforcement option.

Under the terms of the enforceable undertaking the person or organisation enters into an agreement with the OFT which promises to undertake or cease certain actions. If the undertaking is accepted and signed by the Commissioner for Fair Trading or a delegate of the Commissioner, it is enforceable in a court of law.

2 Scope

This policy applies to all staff engaged in compliance, enforcement and related duties within the OFT and should be read in conjunction with the [Compliance and Enforcement Policy \(CEP\)](#).

Human rights requirements and limitations under sections 58 and 13 of the *Human Rights Act 2019* are considered prior to actioning an Enforceable Undertaking.

This document provides an overview of the following matters:

- The OFT legislation that includes enforceable undertakings as an option
- Benefits of enforceable undertakings as a tool for achieving compliance with the legislation
- Considerations for the use of enforceable undertakings
- Contentious issues
- Procedure for producing an undertaking
- Monetary penalties

3 Legislation

Inspectors must ensure legislation relevant to an offence allows for an enforceable undertaking as an enforcement action. The following legislation allows for enforceable undertakings:

- Australian Consumer Law (QLD) – Chapter 5, Division 1 – Undertakings
- *Fair Trading Act 1989* – section 62
- *Agents Financial Administration Act 2014* – Part 10, Injunctions and Undertakings
- *Debt Collectors (Field Agents and Collection Agents) Act 2014* – Part 10 – Injunctions and Undertakings
- *Introduction Agents Act 2001* (IAA) – Part 8 – Miscellaneous, Division 1 – Undertakings
- *Motor Dealers and Chattel Auctioneers Act 2014* – Part 8, Injunctions and Undertakings
- *Tourism Services Act 2003* – Part 7, Undertakings
- *Property Occupations Act 2014* – Part 10 – Injunctions, undertakings, preservation of assets and civil penalties.

4 Background on Enforceable Undertaking

The [Fair Trading Act 1989](#) provides that the Commissioner or their delegate, may receive and consider complaints, investigate them and take such action as seems proper. The OFT's CEP provides guidance as to what action will be proper in which circumstances. Generally, enforceable undertakings are only considered to be an appropriate outcome:

- in respect of a serious breach of legislation, such as a category 1 or 2 breach; and
- the OFT has obtained sufficient admissible evidence to establish a prima facie breach has occurred; and
- the person or organisation agrees to an enforceable undertaking on terms which would be acceptable to the Commissioner or delegate.

An enforceable undertaking will generally only be considered when:

- the OFT has considered starting enforcement action in respect of an alleged breach of the relevant legislation
- the OFT considers the undertaking to be an appropriate regulatory outcome, having regard to the significance the issues will, or are likely to, impact consumers, the marketplace and to the community.

Other factors determining whether an enforceable undertaking is appropriate are:

- whether the person or organisation makes a positive commitment to stop the particular conduct or alleged breach, and not recommence that conduct
- whether the person or organisation has agreed to refund affected consumers
- the conditions of the undertaking
- if the person or organisation entering into the undertaking is likely to comply with the conditions of the undertaking
- whether the person or organisation is prepared to acknowledge the OFT has reason to be concerned about the conduct or alleged breach
- the nature of the conduct or alleged breach and the regulatory impact of the undertaking compared with that of the other forms of enforcement remedy
- the prospects for a speedy resolution of the matter.

The Commissioner or delegate may choose not to accept an offer of undertaking where commencing civil, administrative or prosecution proceedings would secure a complete settlement or another outcome not available through an undertaking.

When considering whether an enforceable undertaking is the appropriate action, it must be considered whether there is a benefit to avoid the afore-mentioned compliance actions.

5 Benefits of enforceable undertakings

Enforceable undertakings are beneficial for the marketplace as they have the potential to educate and rehabilitate by creating behavioral and cultural change. This can result in long term improvements in the marketplace and increased overall compliance.

a. Benefits for trading entities include:

- no stigma of a court case
- offer a "second chance" for the person or organisation to achieve full compliance
- provide guidance to the person or organisation on how to ensure compliance and avoid problems in the future

- options are provided around the scheduling of payments for amounts which may be payable in respect to court orders or Civil Penalty Notices
- they enable the person or organisation to invest money into improving their business processes and culture rather than on legal costs.

b. Benefits for consumers include:

- A timely conclusion of the matter aimed at a quicker and managed return of redress compared with court ordered redress
- not required to attend court
- the ability to tailor the outcome to suit the individual circumstances and may include terms such as apologies, extension of warranties, commitments with respect to the availability of parts and facilities for repair, repayment of commissions etc.

c. Benefits for the regulator include:

- cost effectiveness
- timeliness
- the ability to tailor the outcome to suit the individual circumstances
- rehabilitation focused outcomes which potentially lead to lasting improvements in the marketplace.

Enforceable undertakings provide an opportunity to deliver tangible benefits to the overall marketplace while simultaneously acting as a deterrent to the person or organisation from committing future offences.

6 Contentious issues

Negotiating terms and drafting enforceable undertakings often present unique or challenging issues for OFT officers. These are usually contentious by nature requiring application of expert legal knowledge, advice and support. Issues typically requiring detailed legal expertise and Director level consideration include:

- consistency in the way OFT has previously treated similar breaches
- issues concerning admissions of liability by the person or organisation
- issuing media statements
- refunding or recommending the refunding of money to consumers that cannot be identified
- whether payment of a monetary penalty should be included in lieu of other enforcement options
- the operative period of the undertaking must allow a reasonable time in which the person or organisation can satisfy the requirements of the relevant terms and cannot be open ended
- character and compliance history of the person or organisation
- person's or organisation's willingness to cooperate and rectify damage caused to consumers
- mitigating circumstances unique to the matter on hand
- failure of the person or organisation to comply with the terms of an undertaking.

7 Enforceable undertakings register

The OFT is required by law to keep, maintain and make available for public inspection, a register of enforceable undertakings accepted by the Commissioner. The [Undertakings register](#) is maintained by OFT's Enforcement Coordinator (EC), through the Director, Investigation and Enforcement Division.

Extracts of some of the registers are published on the Queensland government website. The publishing process is updated regularly as new undertakings are added to the register. The extract must only contain:

- number of the undertaking
- the non-compliant person or organisation details
- date of the undertaking
- the Act and section(s) contravened.

Officers will seek advice and discuss publication of an extract, with the OFT's EC prior to publication. The EC maintains the undertaking register and is responsible for the publication of those extracts via the Communications Unit uploading the updated document. The ACCC have a similar enforceable undertakings register on their website.

8 Media statements

The OFT will consider the seriousness of the offence and determine if a media statement is warranted in the public interest. If a media statement is required, the officer will provide relevant information to the Communications Unit for the preparation of a media statement. The media statement is to be approved by the relevant Director and Executive Director and proceed through standard departmental approvals, prior to release.

9 Consultation

Inspectors using this guideline will have consulted with their manager and the EC whereby it was determined:

- a prima-facie breach is identified and can be supported by reliable evidence
- the person and/or organisation ("trader") was consulted about the proposed action and indicates a willingness to resolve the issue by way of an enforceable undertaking
- an undertaking is deemed the most effective method of enforcement action against the offending person or organisation

10 Terms of an enforceable undertaking

a. Non-negotiable terms of an undertaking

The OFT will not negotiate on the inclusion of certain terms within an undertaking, these may include:

- the person's or organisation's right to access independent legal advice
- the OFT's legislative obligation to keep and maintain a public undertakings register
- the right of the OFT or the Minister to issue a media statement
- legislative provisions allowing variations to the undertaking by the OFT
- consequences of the person or organisation contravening the undertaking
- the effective date or commencement date of the undertaking

The OFT will **not** accept an undertaking if it contains a clause:

- denying liability or omits any of the standard clauses noted above unless otherwise specifically excluded by the Commissioner/Chief Executive or delegate
- that establishes defenses for possible non-compliance with an enforceable undertaking

b. Undertaking terms of corrective action

An enforceable undertaking must allow a reasonable time in which the person or organisation can satisfy the requirements of the relevant terms. An enforceable undertaking cannot be open ended and must:

- i. set out how the trader will address the conduct which has resulted in a breach of legislation administered by the OFT. This may include:
 1. rectifying non-compliant signage, documents, or contractual terminology
 2. ceasing certain conduct
 3. commencing certain required processes or activities
- ii. set out how the trader will prevent that conduct occurring again. This may include:
 1. details of the monitoring and reporting mechanisms to be adopted (e.g. developing internal control programs)
 2. the name of the contact officer who is responsible for monitoring and complying with the undertaking
 3. the position name and information within OFT to whom the contact officer must report (as staff movement frequently occurs)
- iii. set out how the trader will rectify the consequences of the conduct. This may include for example:
 1. corrective advertising
 2. providing redress to affected consumers
 3. where the affected consumers cannot be specifically identified, providing for payment of money or other consideration received from consumers towards a relevant educative public purpose or community group
- iv. specify an end date for the enforceable undertaking (usually a whole year/s from the date of commencement).

In cases of **misleading conduct**, the undertaking will require the person or organisation to **unequivocally** correct the misleading conduct.

c. Financial terms of an undertaking

The terms of the undertaking may be extended in consultation with the relevant Manager and Director in conjunction with the EC to include potential reimbursement, compensation or redress for parties adversely affected (victims).

In the event victims are unable to be identified, OFT can consider stipulating in the undertaking that an amount must be paid to improving or resourcing other areas of the community. Appropriate recipients for this money may include community groups or charitable associations, directly or indirectly, affected.

The undertaking may also include payment of a monetary penalty by the trader in lieu of the OFT pursuing penalties via other avenues (such as Penalty Infringement Notices, Civil Penalty Notices, court ordered penalties, etc).

The OFT may require the undertaking also state the trader will pay the OFT's quantifiable costs such as professional testing of product(s), translation, professional costs (e.g. legal professional work) and any other expenses that directly relate to establishing the breach and preparing the undertaking.

If the trader does not have the capacity to pay all costs due to financial hardship, preference should be given to compensating the victims first and foremost.

Including monetary payments in an undertaking can be of some benefit to the person or organisation as it may allow for the amount to be paid off over a longer period than is provided for under statutory regimes. This payment plan is included as a schedule being the last page of the EU with a table stipulating dates and payment amounts to pay off the relevant total. However, where such a term is contemplated, careful consideration must be made to balance competing objectives such as:

- enabling the person or organisation to invest time and resources into improving their business processes and culture rather than on legal costs, and
- circumstances where the person's or organisation's behaviour which led to the undertaking is so bad the public would expect a monetary impact be experienced by the person or organisation.

Once the trader has agreed to the inclusion of compensation in the undertaking, officers can then consider the additional inclusion of any monetary penalty.

11 Administrative process for an undertaking

The OFT has developed legislation specific [templates](#) for use in drafting an undertaking under the relevant Act. The enforceable undertaking templates must be used in all cases and must be obtained from the intranet. Compliance program level (1 low – 4 high) [examples](#) are also provided on the intranet for consideration when formulating an undertaking.

1. Preparing an enforceable undertaking

Below provides the step by step process for preparing an enforceable undertaking.

- a. Investigating Officer prepares draft and forwards to their supervisor for consideration, any amendments & approval.
- b. The approved draft is forwarded by the investigating officer to the EC for review.
- c. The EC liaises with the investigating officer and supervisor/manager to finalise a draft
- d. The EC forwards the approved draft to the relevant Director and cc's in investigating officer and Supervisor/Manager for Director final approval. Manager will then forward to the Director for final approval. Once approved this will be sent back down to the Manager, Supervisor & Investigating Officer to implement.
- e. The undertaking is provided to the trader and any further amendments requested by the trader or

their legal representative are to be considered and where appropriate approved by the relevant Director. (See 4.2 or 4.3 see comments below)

- f. The final approved undertaking is signed by the trader and subsequently by the relevant Director. (See 4.2 or 4.3 see comments below).
- g. Any alterations to the terms of an enforceable undertaking during the relevant undertaking period must be approved by the Director. Once entered into, compliance with an enforceable undertaking is not optional. If the undertaking is breached, the OFT may ask the court for an order requiring the person or organisation to comply with the undertaking. Ignoring such a court order may lead to further court sanctions being imposed.

a. **The inclusion of monetary penalties**

The OFT may include terms which require the payment of a monetary penalty in lieu of other enforcement action. Officers must complete the [Enforceable undertaking finance notification](#) document located on the intranet and email it to the EC with the undertaking.

b. **Negotiations and sign off**

1. The undertaking is presented to the trader and if required, negotiations between the trader and their lawyers must be undertaken with the assistance of the investigating officer's manager.
2. Once negotiations have been completed the final version of the undertaking is provided to the person or organisation for signature and return to the OFT.
 - a. If the matter is contentious a [memorandum](#) to the delegate of the Commissioner/Chief Executive should be forwarded to the divisional director for approval. Note: High profile or contentious issues may also be referred by the delegate to the Commissioner/Chief Executive for signing.
3. Once signed by the delegate, the original undertaking is forwarded to the EC for scanning and inclusion in the enforceable undertaking folder on the OFT's business drive. The details are entered onto the enforceable undertaking register. A copy is also be forwarded to the investigating officer or their work unit for placement on the investigation file.
4. The OFT's Finance Unit must also be notified of any undertakings that include monetary penalties imposed on a person or organisation. Refer to sections 4.3 of this document which outlines the inclusions of monetary penalties and repayment information to be provided to the Finance Unit.
5. A copy of the signed undertaking is then forwarded to the person or organisation.
6. The relevant Director will consider if a media statement is warranted and if so, work with the LGFT's Communications staff to draft the media statement.