

**Office of Fair Trading**

# **Enforceable undertaking policy**

**2019**



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## 1 Overview and purpose

Enforceable undertakings are written undertakings (or deeds) offered by a person or organisation proven to have breached 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 promises to do, or not do, certain things. If the undertaking is accepted and signed by the Commissioner or a delegate of the Commissioner, it is enforceable in a court.

This document outlines and clarifies the OFT's policy on the use and enforcement of undertakings.

## 2 Scope

This policy applies to all staff engaged in the OFT's compliance, enforcement and related duties within the OFT.

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 enforceable undertakings
- Obtaining an undertaking
- Compensation
- Contentious issues.

This policy is to be read in conjunction with the OFT's [Compliance and Enforcement Policy \(CEP\)](#).

## 3 Legislation

Officers 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* – Part 5, Division 1B
- *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 What are enforceable undertakings?

Enforceable undertakings are Commissioner, or delegate of the Commissioner, approved written undertakings a person or organisation has accepted and are enforceable in a court. They usually arise from a serious breach of OFT legislation.

Enforceable undertakings are generally accepted by the OFT only if they are, in all the circumstances, a suitable alternative to civil, administrative or prosecution proceedings. The quantum of an undertaking must be proportionate to the benefit of avoiding the afore-mentioned compliance actions.

Once entered into, compliance with an enforceable undertaking is not optional. If the undertaking is breached, the OFT will 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.

The terms of an enforceable undertaking may cover a broad range of matters but must bear a clear or direct relationship with the alleged breach. They may for example, depending on the circumstances, include some or all of the following requirements:

- compensation for affected consumers
- running corrective advertisements
- a direct reference to either an infringement notice or civil penalty notice that is to be or has been issued for the respective breach
- paying certain costs related to an investigation if they are otherwise recoverable at law
- stipulating a time period within which compliance with the undertaking is required and not be otherwise open-ended
- introducing fair trading compliance programs
- agreeing to monitoring and reporting on compliance with terms of the undertaking at specific times, including where that monitoring and reporting is undertaken by a stipulated independent third party at the person's or organisation's expense.

## 5 Enforceable undertaking v undertaking to the court

An enforceable undertaking is different from an undertaking to the court. An undertaking to the court is normally given instead of the court giving an injunction or other relief. The main differences between an undertaking to the Commissioner and an undertaking to the court are:

- an undertaking to the court may only be given when a court action has commenced. The Commissioner does not have to commence court action before accepting an undertaking under the OFT's legislation
- an undertaking to the court may be enforced in the same way as an injunction. A breach of an undertaking to the court may itself be the subject of contempt proceedings, whilst a breach of an undertaking to the Commissioner may result in an application to the court for an order relating to compliance, compensation, security bond or forfeiture.

## 6 Benefits of enforceable undertakings

Enforceable undertakings have a number of benefits for the marketplace compared to other enforcement activities or court and tribunal based actions. They have the potential to achieve a greater range of outcomes when compared to a fine or compensation order, including for example behavioural and cultural change within an organisation, leading to lasting improvements in the marketplace and increased overall compliance.

For trading entities, enforceable undertakings have specific benefits, including:

- an undertaking, whilst a public outcome, does not carry the stigma of a court case
- they offer a "second chance" for the person or organisation to achieve full compliance
- they can provide guidance to the person or organisation on how to ensure compliance and avoid problems with regulators in the future
- they give the person or organisation options around the scheduling of payments for amounts which would be payable in respect to Penalty Notices

- they enable the person or organisation to invest money into improving their business processes and culture rather than on legal costs in defending court matters and possible fines.

For consumers, enforceable undertakings have benefits, including:

- timeliness of proceedings enable them to receive refunds earlier than would be the case with court matters
- not required to attend court
- the ability to tailor the outcome to suit the individual circumstances and may if appropriate include terms such as apologies, extension of warranties, commitments with respect to the availability of parts and facilities for repair, etc.

For the regulator, enforceable undertakings also have benefits, including:

- cost effectiveness
- timeliness
- the ability to tailor the outcome to suit the individual circumstances
- potentially a greater range of outcomes (as opposed to simply a fine or compensation order) leading to lasting improvements in the marketplace and increased compliance.

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 engaging in the committal of future offences.

## 7 Use of enforceable undertakings

The [Fair Trading Act 1989](#) provides that the Commissioner or the Commissioner's delegate, may receive and consider complaints, investigate them and take such action as seems proper to the Commissioner or the Commissioner's delegate.

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 the Commissioner's 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 the Commissioner may consider when deciding whether or not to accept an enforceable undertaking as a regulatory outcome 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 the Commissioner's 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.

## 8 Obtaining an undertaking

The decision on whether or not to draft an undertaking for a matter will only occur following consultation between the investigating officer, their manager and the OFT's Enforcement Coordinator (EC). Should any aspect of the undertaking be considered contentious by either the officer, their manager or the EC, the unit's Director must be consulted.

Once a decision is made to proceed with drafting an undertaking, officers must refer to the OFT's Enforceable undertaking procedural guidelines for creating an undertaking. The guidelines set out the process for determining the terms of the undertaking and approval processes.

## 9 Terms of an undertaking

Enforceable undertaking terms can include:

- Non-negotiable terms
- Terms of corrective action
- Financial terms (if financial loss or costs were incurred due to the contravention).

While an undertaking does not constitute an admission of guilt by a person or organisation, failure to comply with the terms of an undertaking is an offence the outcome of which is to be determined by the Magistrates Court.

## 10 Monetary penalties and compensation

The OFT may include terms which require the payment of a monetary penalty by the trader in lieu of other enforcement action. The guidelines also set out how to determine monetary penalty amounts if imposed on a person or organisation. However, prior to considering the inclusion of a monetary penalty in an undertaking, priority must be given to consumers who, due to the misconduct of the person or organisation, have been identified during the course of the investigation as being entitled to compensation.

Obtaining compensation for consumers is a primary objective of OFT and should at all times be prioritised above any monetary penalty which may be imposed in an undertaking.

In the event consumers are unable to be identified, OFT can consider stipulating in the undertaking that compensation must be paid to improving or resourcing 'other' areas of the community. This is particularly pertinent in instances where the person or organisation has profited from their action(s). Appropriate recipients for compensation can include community groups or charitable associations, directly or indirectly, affected.

It is essential when officers are deciding an area of community for which compensation should be allocated, there is no conflict of interest (perceived or real) to the department, officers or family members of the department's employees.

## 11 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 the payment of a monetary penalty should be included in lieu of other enforcement options
- the operative period of the undertaking (sunset clauses)
- 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.

## 12 Enforceable undertakings register

The OFT is required, in accordance with each of the relevant Acts, 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 EC, through the Director, Investigation and Enforcement Division.

Extracts of enforceable undertakings are published on the Queensland government website. The publishing process is to be repeated as new undertakings are entered into. 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 the publication of an extract, with the OFT's EC prior to publication. Referral and updating of information to the OFT Communication Unit on an undertaking is also recorded in the register and is considered a record of when information was provided to, or requested from, the Communications Unit.

## 13 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.