

Office of Fair Trading

Enforceable undertaking policy

Version 3.1 - January 2017



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1. Purpose

Enforceable undertakings are written undertakings (or deeds) offered by a person or organisation to the Office of Fair Trading (OFT) in which that person or organisation promises to do, or not do, certain things. If the undertaking is accepted and signed by the Commissioner it is enforceable in a court.

This document outlines and clarifies the OFT's policy on the processes associated with undertakings. It addresses contents, acceptance, 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 policy provides guidance to OFT staff on how and when to use enforceable undertakings and the process for obtaining an undertaking.

This policy addresses the following matters:

- benefits of undertakings as a tool for achieving compliance with the legislation
- the OFT legislation that includes enforceable undertakings as an option
- considerations for the use enforceable undertakings
- procedures to be followed when obtaining an undertaking
- standard clauses to be used in enforceable undertakings
- acceptable terms/conditions to be used
- contentious issues.

This policy is to be read in conjunction with the OFT's:

- Compliance and Enforcement Policy and Standards (CEPS)
- Compliance Investigations Manual (CIM)
- Enforceable Undertaking – Guideline – Annexure A
- Enforceable Undertaking – Finance Notification – Annexure B

3. Definitions, terms and acronyms

- OFT – Office of Fair Trading
- CEPS – Compliance and Enforcement Policy and Standards
- CIM – Compliance Investigations Manual
- Commissioner – Commissioner for Fair Trading or delegate

4. What are enforceable undertakings?

Enforceable undertakings are written undertakings (or deeds) offered by a person or organisation, and accepted and signed by the Commissioner, that are enforceable in a court. They usually arise from an OFT allegation of a serious breach of 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.

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 for certain costs associated with the 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 trader's expense.

In instances where a trader has received payments from consumers in respect to the alleged contravention but those consumers are not able to be specifically identified and refunded under the undertaking, the terms of the undertaking may instead provide that the trader will pay the money towards a relevant educative public purpose or community group.

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.

5. 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 traders, 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 trader to achieve full compliance
- they can provide guidance to the trader on how to ensure compliance and avoid problems with regulators in the future
- they give the trader options around the scheduling of payments for amounts which would be payable in respect to Penalty Notices,
- they enable the trader 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.

6. Consideration to use enforceable undertakings

The Fair Trading Act provides that the Commissioner may receive and consider complaints, investigate them and take such action as seems proper to the Commissioner.

The OFT Compliance Policy and Standards 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 trader agrees to an enforceable undertaking on terms which would be acceptable to the Commissioner.

The Commissioner will generally only consider accepting an enforceable undertaking 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 that the Commissioner may consider when deciding whether or not to accept an enforceable undertaking as an appropriate 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 trader has agreed to refund affected consumers
- whether 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 that 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 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.

7. Procedures and guidelines to be followed when obtaining an undertaking

An OFT officer will decide whether or not to draft an undertaking for a matter only following consultation between the investigating officer and their manager. Should any aspect of the undertaking be considered contentious by either the officer or their manager, consultation with the Director should also occur.

Officers must refer to the Enforceable Undertakings – Guideline - Annexure A of this policy which sets out the process for which OFT officers can determine a monetary penalty amount should it be imposed on a person or organisation.

Once a decision is made to proceed with drafting an undertaking the following steps will apply:

- a prima-facie breach must be identified and supported by reliable evidence sufficient to commence prosecution action
- the trader is to be consulted regarding the proposed action and must indicate a willingness to resolve the issue by way of an enforceable undertaking
- the investigating officer is to prepare a draft of the enforceable undertaking and provide it to their supervisor/manager for approval
- the enforceable undertaking must be forwarded to the Enforcement Coordinator for consideration
- the Enforcement Coordinator will forward the enforceable undertaking back to the investigating officer with suggested amendments (if required)
- once amendments are approved by the investigator's supervisor the enforceable undertaking will be forwarded to the investigating officer's manager who will conduct a further review for approval
- amendment(s) to the draft undertaking must be approved by the investigating officer's manager. Significant changes to the draft must be referred to the relevant Director for prior approval
- negotiations between the trader and their lawyers must be undertaken with the assistance of the investigating officer's manager
- once negotiations have been completed and the final version of the draft undertaking is finalised the trader shall be provided with the undertaking for signature and return to the OFT
- a memorandum seeking the signature of the delegate of the Commissioner as appointed under the current departmental Delegation for the Act upon which the undertaking is entered into shall be forwarded to the relevant Director. Note: High profile or contentious issues will be referred by the delegate to the Commissioner/Chief Executive for signing.
- once signed by the delegate, the original undertaking shall be forwarded to the Enforcement Coordinator for placement on the enforceable undertaking file and register, a copy shall also be forwarded to the originating work unit for placement on operational files
- the OFT's Finance Unit must also be notified of any undertakings which include monetary penalties imposed on a trader. Officers should refer to Annexure A of this Policy which outlines the information which must be provided concerning the repayment schedule.
- a copy of the signed undertaking shall be forwarded to the trader
- the Enforcement Coordinator will ensure the undertaking is included in the Enforceable Undertaking Register
- the relevant Director, will consider issuing a media statement and if warranted work with the Principal Communication Officer responsible for media to draft the statement.

8. Enforceable undertakings terms

The OFT has developed a standard format for use in drafting an undertaking under the relevant legislation. This format is to be used in all cases and may be obtained from the Intranet.

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

- the trader's right to access independent legal advice
- the OFT's legislative obligation to keep and maintain a public 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 trader contravening the undertaking
- the effective date or commencement date of the undertaking
- the person or organisation must acknowledge that the undertaking does not affect the right of other parties, or constitute a restraint on the OFT except in relation to specific civil or administrative action.

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

- denying liability or it omits any of the standard clauses above (unless otherwise specifically excluded by the Commissioner)
- that sets up defences for possible non-compliance with an enforceable undertaking.

An enforceable undertaking must set out how the person or organisation will:

- address the conduct the Commissioner believes on reasonable grounds has resulted in a breach of legislation administered by the OFT. This may include for example:
 - rectifying noncompliant signage, documents, or contractual terminology
 - ceasing certain conduct
 - commencing certain required processes or activities
- prevent that conduct happening again. This may include for example:
 - details of the monitoring and reporting mechanisms it will adopt (e.g. developing internal control programs)
 - the name of the contact officer who is responsible for monitoring and complying with the undertaking
 - the name of an OFT officer to whom the contact officer must report.
- rectify the consequences of the conduct. This may include for example:
 - providing redress to affected consumers
 - 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
 - corrective advertising.

In resolving any matter, the OFT may require the person or organisation to compensate, reimburse or apply other appropriate forms of redress to parties adversely affected by its conduct. Careful consideration of these issues in consultation with the Enforcement Coordinator may result in the terms of the undertaking being extended to address issues of reimbursement, compensation or redress.

In cases of misleading conduct, the OFT will require the person or organisation to unequivocally correct the misleading conduct for which it is responsible.

The OFT may require the undertaking to state that the person or organisation 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.

The undertaking may include terms which require the 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. Including the payment of the money in an undertaking can be of some benefit to the trader as it can allow for the amount to be paid off over a longer period than is provided for under statutory regimes. However, where such a term is contemplated, careful consideration must be made to balance competing objectives including for example:

- one of the primary objectives of undertakings is to enable the trader to invest time and resources into improving their business processes and culture rather than on legal costs
- circumstances where the trader's behaviour which has led to the undertaking is so bad that the public would expect that a monetary impact be experienced by the trader.

9. 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 trader
- substantiating the OFT's reasonable belief that a breach has occurred
- issuing media statements
- maintaining the OFT's public register
- 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 trader
- trader's willingness to cooperate with the regulator and rectify damage caused to consumers
- mitigating circumstances unique to the matter on hand
- failure of the trader to comply with the terms of an undertaking constitutes an offence, the outcome of which must to be determined before the Magistrates Court.

10. 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 Enforcement Coordinator, through the Director, Investigation and Enforcement Division.

Extracts of undertakings are published on the Queensland government website. The publishing process is to be repeated as new Undertakings are entered into. The extract must contain only the headings:

- number of the Undertaking
- the non-compliant trader/person details
- date of the Undertaking
- the Act and section(s) contravened.

Records are to be kept containing the details of the referral of information to the OFT Communication Unit. These records will be kept on an extra tab on the Undertaking register and will be considered a record of when the update was requested.

OFT officers should seek advice and discuss the publication of an extract, with the OFT's Enforcement Coordinator prior to publication.

11. Media statement

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

12. References

- 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
- Compliance and Enforcement Policy and Standards
- Compliance Investigations Manual

Office of Fair Trading

Enforceable undertaking guideline

Annexure A - Version 1.0 – August 2016



1. Overview

Currently, the Office of Fair Trading (OFT) Enforcement Undertaking Policy – Version 3.0 provides that certain terms may be incorporated into an enforceable undertaking, including the payment of monetary penalties. This guideline sets out the process for which OFT officers can determine the monetary penalty amount to be imposed on a trader who is the subject of an enforceable undertaking.

The guideline should be read in consultation with the Enforceable Undertaking Policy - Version 3.0. Officers using this guideline are presumed to have already consulted with their manager whereby it was determined, given the facts at hand, that an undertaking would be the most effective method of enforcement action against the offending trader.

2. Compensation

2.1. Victims

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 trader, 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. For example, should it become apparent that the trader does not have the capacity to pay both compensation and a monetary penalty due to financial hardships, preference should be given to compensating the victims first and foremost.

2.2. ‘Other’ recipients

In the event that 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 trader has profited from their action(s). Appropriate recipients for compensation can include community groups or charitable associations, directly or indirectly, affected. Some examples include but are not limited to Indigenous Consumer Assistance Network and Financial Counsellors Association of Queensland.

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.

3. The inclusion of monetary penalties

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

Section 8.8 of the Enforcement Undertaking Policy – Version 3.0 provides that OFT may include terms which require the payment of a monetary penalty by the trader in lieu of other enforcement action. Generally speaking, undertakings will only be accepted by OFT if they are, in all circumstances, a suitable alternative to civil, administrative or prosecution proceedings.

The quantum of an undertaking must be proportionate to the benefit of avoiding the aforementioned compliance actions. Undertakings provide an opportunity to deliver tangible benefits to the overall marketplace while simultaneously acting as a deterrent to the trader from engaging in the committal of future offences.

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

4. Calculating an appropriate monetary penalty

While broad in nature, section 8. of the Enforcement Undertaking Policy – Version 3.0 provides examples of the types of terms which an undertaking may include. To maintain a more consistent and formalised approach to monetary penalty amounts imposed by OFT in its undertakings, the following process has been developed.

- Determination of a foundation penalty.
- Inclusion of quantifiable costs
- Adjustment to include mitigating factors.

4.1. Determining a foundation penalty

Determining the foundation penalty is the first stage in calculating the monetary penalty amount to be included in the undertaking. The foundation penalty is determined by classifying the contravention into one of the five categories, similar to the categorisation process outlined in the Compliance and Enforcement Policy Standards - Version 2.02.

- **Category 0 offence** – Extreme Risk (issues likely to involve systematic and high serious misconduct with large scale detriment)
- **Category 1 offence** – Very High Risk (consumers unable to be identified)
- **Category 2 offence** – High Risk (consumers have been identified and reimbursements are to be made to affected consumers)
- **Category 3 offence** – Moderate Risk (no financial detriment to consumers as a result of the offence however the offence had the potential to cause consumer loss or affect the integrity of the industry concerned, or it affected the community at large)
- **Administrative offence** – Low Risk (offences against administrative rule or regulation)

Each of the above offence categories has been allocated a pre-determined percentage based on the severity of the offence. In order to calculate the foundation penalty, this percentage is then multiplied by the maximum penalty prescribed for the contravention in the legislation as detailed in Table 1.1

Table 1.1 – Foundation penalty calculations

Foundation penalty calculations	
<p>Insert the details of the provision contravened and place the corresponding civil / penalty infringement amount prescribed for that offence in column A</p> <p><i>Section/provision contravened (include section, subsection or clause number)</i></p> <p><i>*Note – civil penalty amounts will differ according to whether trader is an individual, non-listed corporation or listed Corporation</i></p> <p><i>e.g. – Section 29(1)(d) of the ACL - Misrepresent a person has agreed to acquire goods or services</i></p>	<p style="text-align: center;">\$ (maximum penalty amount)</p> <p style="text-align: center;">divided by 10%</p> <p style="text-align: center;">= \$(A)</p> <p><i>e.g. Ind \$220,000 divided by 10% = \$22,000</i></p>
Category 0 offence (Consumers unable to be identified)	Multiply \$(A) by 80%
Category 1 offence (Consumers unable to be identified)	or 60%
Category 2 offence (Consumers identified and reimbursements to be made to affected consumers)	or 40%
Category 3 offence (No consumer detriment, however, offence had the potential to cause actual harm or affect the industry/community negatively)	or 20%
Administrative offence (Offences against administrative rule or regulation)	or 20%
Foundation penalty	\$(B)

4.2. Inclusion of quantifiable costs

Quantifiable costs are the costs associated with an undertaking enforced by the OFT and are to be incurred by the trader to whom the undertaking relates. If applicable, these costs may be added to the foundation penalty reached above.

Table 1.2 – Activity undertaken

Activity undertaken	Associated cost(s)
Professional costs (e.g. translation services, testing of products and forensic analysis)	\$
Total of quantifiable costs	\$(C)

4.3. Adjustment to include mitigating factors

Procedural fairness provides that mitigating factors must also be taken into consideration in an enforceable undertaking. These factors listed in Table 1.3, while not exhaustive, afford the trader natural justice and act as a reduction to the overall maximum monetary penalty amount.

Table 1.3 – Adjusting factors

Adjusting factors (insert a reduction of 0-10 percentage points for each of the following)	% decrease
The alleged trader's compliance record (max of 10% points reduction)	
The preventative measures put in place by the trader prior to the incident (max of 10% points reduction)	
The presence of any aggravating or mitigating factor concerning the trader (max of 10% points reduction)	
Enforcement action taken by other jurisdictions or Queensland regulators in relation to the incident(s) and the trader's compliance with such enforcement action Note: the percentage of points reduction on this criteria is to be determined on a case by case basis in consultation with the relevant Director	
The extent, speed and appropriateness of corrective action (max of 10% points reduction)	
The degree of cooperation demonstrated by the trader (max of 10% points reduction)	
Financial detriment already incurred by the trader (max of 10% points reduction)	
Other relevant factors (max of 10% points reduction)	
Total of percent points reduction (D)	% (D)
Proposed monetary penalty amount (E)	\$(B) + \$(C) - %(D) = \$(E)