



Enforceable Undertakings Guideline

July 2020



Published by NSW Department of Planning, Industry and Environment

dpie.nsw.gov.au

Title: Enforceable Undertakings Guideline

© State of New South Wales through Department of Planning, Industry and Environment 2020. You may copy, distribute, display, download and otherwise freely deal with this publication for any purpose provided you attribute the Department of Planning, Industry and Environment as the owner. However, you must obtain permission if you wish to charge others for access to the publication (other than at cost); include the publication in advertising or a product for sale; modify the publication; or republish the publication on a website. You may freely link to the publication on a departmental website.

Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (July 2020) and may not be accurate, current or complete. The State of New South Wales (including the NSW Department of Planning, Industry and Environment), the author and the publisher take no responsibility, and will accept no liability, for the accuracy, currency, reliability or correctness of any information included in the document (including material provided by third parties). Readers should make their own inquiries and rely on their own advice when making decisions related to material contained in this publication.

Acknowledgment of Country

The Department of Planning, Industry and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

Contents

Introduction	1
Enforceable undertakings	2
When are undertakings appropriate?	2
Proposing an enforceable undertaking	4
Undertaking templates.....	4
Review information service	4
Procedure for public authorities proposing an enforceable undertaking	4
Timeframes	5
Contents of the Enforceable Undertaking	5
Unacceptable terms	5
Financial Contributions	6
Acceptance of undertaking	7
Review	7
Negotiation of terms	7
Finalising the proposal.....	7
Publication of Enforceable Undertaking	8
Compliance	8
Varying or withdrawing Enforceable Undertakings.....	8
Further information	9
Attachment A: Example content for an Enforceable Undertaking	10
Person(s) giving the Undertaking	10
Background.....	10
Commencement of this Undertaking	10
Undertaking	10
Acknowledgments.....	11

Introduction

This document is a guide to proposing an enforceable undertaking to the NSW Department of Planning, Industry and Environment (the department) in relation to the *Environmental Planning and Assessment Act 1979* (the Act).

This guideline discusses the purposes of enforceable undertakings, the factors that will be considered in deciding whether to accept an enforceable undertaking, and the possible terms of any negotiated enforceable undertakings.

For the purpose of enforceable undertakings in relation to State Significant Development (SSD) or State Significant Infrastructure (SSI), this guideline should be read in conjunction with the department's [Compliance Policy](#), which outlines the aims of the department's approach to compliance and enforcement as well as the tools available.

The Department of Planning, Industry and Environment

The department is responsible for compliance and enforcement functions in relation to SSD and SSI projects. The Planning Secretary of the department can accept an enforceable undertaking under Section 9.5 of the Act.



Enforceable undertakings

An enforceable undertaking is a written, legally binding agreement proposed by a company or individual following an alleged contravention of an Act which serves as an alternative form of enforcement action.

It provides a commitment by a company or individual to implement initiatives designed to deliver tangible benefits for the environment and community. These initiatives should seek to remedy the behaviour of concern that has led to the alleged contravention.

Councils can recommend enforceable undertakings however, in accordance with Section 9.5 of the Act, these must be reviewed and accepted by the Planning Secretary.

Further information for councils proposing to accept an enforceable undertaking is contained in this guideline.

Once accepted by the Planning Secretary, the company or individual is obligated to carry out the specific activities outlined in the enforceable undertaking.

All enforceable undertakings accepted by the Planning Secretary are published on the department's website and form part of the compliance history of a company or individual.

When are undertakings appropriate?

Enforceable undertakings allow a company or individual to acknowledge issues identified in relation to an alleged contravention.

These undertakings provide an opportunity to arrive at a mutually agreed resolution to compliance matters in relation to serious issues where prosecution or civil proceeding may not achieve the desired outcomes or be in the best interest of the public.

The department or councils can seek to resolve matters through undertakings where they believe a breach has, or is likely to have, occurred and resolution by undertaking offers the best solution. When deciding between litigation and/or accepting an enforceable undertaking the department or councils should consider the particulars that will produce the best results in lasting compliance and remedies to address the breach and be in the best interest of the public.

Enforceable undertaking proposals will be considered where it can be demonstrated to be the most effective and appropriate regulatory outcome in the circumstances, with regard to:

- the nature of the alleged contravention;
- the seriousness of the conduct;
- the impact of the alleged contravention on the environment and or community;
- the compliance history of the company or individual involved;
- the size of the company involved;
- the number of complaints received;
- ability of the undertaking to remedy the impacts of the contravention on community and environment;
- good faith of the company/individual involved; and
- prospect for rapid resolution of the matter.

Prosecution, civil proceedings or other enforcement action does not need to have commenced for consideration to be given to an enforceable undertaking proposal.

If a prosecution or civil proceeding has not commenced and an enforceable undertaking is accepted, prosecution or civil proceedings will not be commenced in relation to the breach the

subject of the enforceable undertaking (subject to the company or individual complying with their obligations under the enforceable undertaking).

If a prosecution or civil proceedings have commenced, all reasonable steps will be taken to discontinue the proceedings as soon as possible after the enforceable undertaking has been accepted.



Proposing an enforceable undertaking

Undertaking templates

Templates for enforceable undertakings under the Act are available at Appendix A.

It is recommended that proponents use these templates when preparing an enforceable undertaking for submission.

A proponent does not need to use these templates, but if they choose not to, they must ensure the information and commitments are provided in a clear and easy to understand manner.

Review information service

Before proposing an enforceable undertaking under the Act it is recommended that a company or individual use the review information service provided by the department.

This review aims to explain the proposal submission process, the factors that are considered when evaluating the proposal and the negotiation and acceptance process that will be followed.

Where possible, these review services are provided through face-to-face meetings. Conversations or consultation associated with the proposal of an enforceable undertaking are conducted on a “without prejudice” basis.

This review service is aimed at giving sufficient information to allow a person to determine if proposing an enforceable undertaking is the most appropriate path to take.

The service will also outline the scope of activities likely to be required within the proposed undertaking for it to be considered. The company or individual may also wish to obtain legal advice as the review information service is not legal advice.

Any assistance provided should not be a guarantee that the proposal will be accepted if the advice is followed. Contact details for this service are provided at the end of this guidance document.

Procedure for public authorities proposing an enforceable undertaking

A public authority may propose an enforceable undertaking. This process can be initiated by contacting the department by email: compliance@planning.nsw.gov.au.

When proposing an enforceable undertaking, a public authority must provide the following information to the department:

- the terms of the proposed enforceable undertaking;
- details of financial contributions, where relevant; and
- an assessment of the proposed enforceable undertaking against this guideline

Once all the above information has been received, the department will then review it.

The department will consider the proposed enforceable undertaking and may:

- ask for further information;
- make amendments to the enforceable undertaking;
- recommend that the enforceable undertaking be accepted by the Planning Secretary or their delegate (the Planning Secretary or their delegate may still exercise their discretion in determining whether the enforceable undertaking should proceed);
- recommend that the enforceable undertaking should not proceed.

If the department recommends that the proposed enforceable undertaking is accepted, then the enforceable undertaking is to be executed by the party proposing it (where not proposed by a public authority). It is also to be executed by the public authority.

The Planning Secretary or their delegate can then decide whether to accept or reject the enforceable undertaking.

Note, if a proposed enforceable undertaking by a public authority is accepted, it is a matter for that public authority to enforce it.

Timeframes

A company or individual considering an enforceable undertaking must negotiate a timeframe for the submission of the proposal. Early agreement on acceptable timeframes is essential to ensure a timely consideration of the proposal. An enforceable undertaking proposal may be refused if there was unreasonable delay in proposing it.

Investigations and legal proceedings will continue until a proposed enforceable undertaking is accepted.

Contents of the Enforceable Undertaking

The specific terms to be included in an enforceable undertaking will vary depending on the nature of the alleged contravention and the actions that are proposed to remedy the matter. In general terms, the enforceable undertaking must include:

- particulars about the company or individual proposing the undertaking;
- details of the alleged contravention;
- an acknowledgement or admission that the conduct constitutes or was likely to constitute a breach of the Act;
- an acknowledgement of the seriousness of any harm including potential harm to the environment or community;
- a positive commitment to cease the conduct;
- the terms of the proposed undertaking including specific details of remedies offered and the process to audit or verify their implementation;
- positive reporting requirements to the department or the relevant council where the enforceable undertaking is between the council and an offender. This will include providing information to verify compliance if requested;
- future actions to prevent recurrence and improve compliance programs;
- acknowledgement that the department will make the enforceable undertaking publicly available and may refer to in media or publications;
- an enforceable undertaking may also be required to include a commitment regarding reimbursement of the department's reasonable costs in accepting such an undertaking including the costs involved in investigating the original offence, reviewing the proposal and monitoring compliance with the undertaking during which it is in force.

Unacceptable terms

An undertaking cannot include:

- any denial of liability;
- statements that the enforceable undertaking is not admission for purposes of a third-party action;
- terms that set up defences for possible non-compliance with the undertaking;

- terms that may impose an obligation on the department;
- any terms that may set up defences for possible future contraventions of the Act;
- terms that impose obligations on a third party;
- statements that the conduct is inadvertent or self-serving statements seek to minimize the consequences of the conduct;
- submissions on why prosecution or other enforcement action should not be commenced or why the undertaking should be accepted.

Financial Contributions

A financial contribution may be included as part of an enforceable undertaking.

Any financial contribution may be considered against the following relevant considerations:

- The environmental harm caused by the breach (potential or actual);
- The benefit to environment, industry or community;
- Monetary benefit from the breach;
- Benefit from the financial contribution to the environment or community;
- Possible penalties a court may impose for the breach if prosecuted and convicted of the breach;
- Legal costs of a prosecution;
- The nature and size of commitments the department has accepted in previous enforceable undertakings;
- Potential for negative publicity to the department or the public authority.

As a minimum, financial contributions must include:

- specific details of time frames;
- specific details of payment details including trust fund or bank account details, budgets, agreements or contracts;
- details of how the financial contribution will be audited and reported upon back to the department.

Before a financial contribution can be accepted all parties must declare and confirm their conflict of interests in writing to the department.

Enforceable undertaking requirements are included as attachment to this guidance document as Attachment A – Example of content for an Enforceable Undertaking.



Acceptance of undertaking

Each proposal for an enforceable undertaking will be considered on a case-by-case basis.

If investigations into an alleged contravention are underway at the time a proposal is received, they will continue until the proposal is accepted by the Planning Secretary. Similarly, if a prosecution has commenced, it will continue until the proposal is accepted by the Planning Secretary.

Review

The department will conduct a review of the proposal when received. Expert independent advice may be sought during this process. The assessment takes into account the nature of the alleged contravention and the appropriateness of the action proposed by the company or individual.

The review process seeks to determine whether the enforceable undertaking is an appropriate regulatory response with regard to the specific circumstances.

Negotiation of terms

If necessary, negotiations with the company or individual proposing the enforceable undertaking will be conducted regarding the inclusion of specific terms.

Finalising the proposal

An enforceable undertaking will not take effect until it is accepted and signed by the Planning Secretary of the Department of Planning, Industry and Environment or their delegate. A later date for commencement may be specified, if necessary.

Publication of Enforceable Undertaking

When an enforceable undertaking is accepted, the terms of enforceable undertakings are a matter of public record and all enforceable undertakings that have been accepted by the Planning Secretary (or delegate) will be published. The department will publish any accepted enforceable undertakings (including those proposed in relation to a local council consent and accepted by the Planning Secretary) on its website within 14 days of acceptance of the enforceable undertaking.

Enforceable undertakings will not be accepted in confidence. However, certain information in an enforceable undertaking will not be made publicly available if the company or individual requests that such information not be released and the department is satisfied that it:

- is commercial in confidence and/or
- contains personal details of an individual.

If a copy of an enforceable undertaking is made publicly available with such confidential information redacted, the published copy will include a note stating that certain information has been redacted.

Compliance

Compliance with the terms of an enforceable undertaking will be strictly monitored by the department in cases where the matter relates to an SSD or SSI, or by the relevant council in cases where the enforceable undertaking relates to a matter proposed by that council.

If following an investigation, the department or council (whichever is relevant) determines the enforceable undertaking has been breached, it can take a number of approaches under the Act.

For example, the department or the relevant council may apply to Court for orders as follows:

- that the terms of an enforceable undertaking has been breached;
- directing the person to comply with terms of an enforceable undertaking;
- directing a person to pay the state an amount not exceeding any financial benefit that such person obtained and is attributable to the breach;
- directing compensation to a person who has suffered loss or damage as a result of a breach;
- requiring a person to prevent, control, abate or mitigate an actual breach or likely damage to the built or natural environment;
- requiring a person to make good any damage caused as a result of the activity or breach.

Varying or withdrawing Enforceable Undertakings

A company or individual may apply to withdraw or vary an enforceable undertaking with the consent of the Planning Secretary or delegate.

In the case of enforceable undertakings referred by councils, the council will need to be satisfied of the considerations below and recommend to the department that the undertaking be varied or withdrawn.

Requests to vary an enforceable undertaking will only be considered if:

- it does not alter the spirit of the original undertaking;
- compliance with the original undertaking is subsequently found to be impractical;
- there has been a material change in circumstances.

An undertaking will not be varied to provide for another, separate contravention of a relevant Act.

Variations or withdrawals of an enforceable undertaking will only take effect when authorised and signed by the Planning Secretary.

Withdrawals of, and variations to, enforceable undertakings will be published. Enforceable undertakings will not be removed from the public register and will remain on the register after a company or individual has discharged all obligations of the undertaking.

Further information

Please contact the Compliance Team on:

Phone: 1300 305 695

Email: compliance@planning.nsw.gov.au

Web: www.planning.nsw.gov.au/compliance

Attachment A: Example content for an Enforceable Undertaking

This is an Enforceable Undertaking given under Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* by [Company and ACN or ABN].

Person(s) giving the Undertaking

This Undertaking is given to the Department of Planning, Industry and Environment (the department) by [insert full name of Company] ACN [insert ACN or ABN] ([Company]), for the purposes of section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)*

Background

[Description of Company's business and activities relevant to investigated conduct]

[Description of the conduct the subject of the investigation]

[Explanation of why the department considers the conduct to contravene the Act]

[Response from Company—for example: In response to the department's investigation, Company has:

- a) [admitted] [acknowledged] that its conduct contravened Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)*, and
- b) offered this Undertaking to the department.

Commencement of this Undertaking

This Undertaking comes into effect when:

- (a) this Undertaking is executed by [Company], and
- (b) this Undertaking so executed is accepted by the Planning Secretary of the department or delegate.

(the Commencement Date).

Undertaking

[Company] undertakes for the purposes of section 9.5 of the Act that it will:

- i. #####detail remedies offered to ameliorate any environmental or community impacts
- ii. reimburse the department for agreed costs associated with investigation and monitoring of undertaking
- iii. any contribution to legal costs
- iv. #####detail improvements that have been made to remedy the situation in terms of training or compliance/auditing programs, eg

If inclusion of compliance program obligations is required, insert here in the following format:

- v. establish and implement a Compliance Program or Independent Auditing (Compliance Program) in accordance with the requirements set out in "Annexure X", being a program designed to minimise [Company name]'s risk of future breaches of [INSERT: relevant sections or parts of the Act or consent] and to ensure its awareness of the responsibilities and obligations in relation to the requirements of [INSERT: relevant sections or parts of the Act] within X months of the date of this Undertaking coming into effect

- vi. maintain and continue to implement the Compliance Program or Independent Audit program etc for a period of X years from the date of this Undertaking coming into effect, and
- vii. provide, at its own expense, a copy of any documents required by the department.

Acknowledgments

[Company] acknowledges that:

- a) the department will make this Undertaking publicly available including by publishing it on the department’s public register of section 9.5 undertakings on its website
- b) the department will, from time to time, make public reference to this Undertaking including in news media statements and in department’s publications
- c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct, and
- d) [a summary of the Department Compliance Program review reports referred to in Annexure # of this Undertaking may be held with this Undertaking in the public register].

Executed as an Undertaking

Executed by [insert full name of Company] [insert ACN or ABN] pursuant to section 127(1) of the Corporations Act 2001 by:

Signature of director	Signature of a director/company secretary (delete as appropriate, or entire column if sole director company)
Name of director (print)	Name of director/company secretary (print)
Date	Date

Accepted by the Planning Secretary of the Department Planning, Industry and Environment pursuant to Section 9.5 of the *Environmental Planning and Assessment Act 1979* on:

Date

and signed on behalf of the Department:

Planning Secretary or delegate

Date