

Enforceable undertakings guidelines

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Overview

These guidelines deal with the administrative power of the EPA to accept enforceable undertakings, contained in section 253A of the Protection of the Environment Operations Act 1997 which commenced on 1 May 2006. These guidelines discuss the purpose behind enforceable undertakings, the principles the EPA will take into account in deciding whether to enter into an enforceable undertaking and the terms of enforceable undertakings.

Introduction

The Protection of the Environment Operations Act 1997 (the Act) administered by the EPA creates a number of offences. When a breach of the Act occurs, a number of options are available to the EPA, including prosecution, on-the-spot fines and warning letters. The decision whether or not to prosecute is taken in accordance with the *EPA Prosecution Guidelines*. If the EPA does prosecute, the case is generally heard before the Land and Environment Court or the Local Court.

The EPA's ability to accept enforceable undertakings enhances its enforcement capability. This power gives the EPA a legislative basis for negotiating administrative solutions and accepting undertakings which are enforceable by the Land and Environment Court.

Legal proceedings will continue to be the focus of the EPA's enforcement work because of the significant effects of court decisions, including:

- deterrence by way of penalty and publicity
- punishment of unlawful conduct
- authoritative statement of the seriousness of breaches of the Act
- clarification of the requirements of the Act

When choosing between legal proceedings or an administrative solution the EPA will choose the approach which seems likely to produce the best results, in terms of lasting compliance with the law, redress for environmental harm and obtaining a good and lasting benefit for the environment.

These guidelines set out the EPA's view on the policy, interpretation and operation of s253A of the Act.

PART A: When the EPA will accept enforceable undertakings

The EPA may accept enforceable undertakings in connection with a matter in relation to which the EPA has a function under the Act.

Broadly, these functions include ensuring that the best practicable measures are taken for environmental protection including the issue of environmental protection licences, and also investigating alleged non-compliance with the Act for the purposes of enforcement or other regulatory action.

An enforceable undertaking can be initiated by a company or individual, or as a result of discussions between the EPA and the other party. In cases where an environmental protection licence is held, the enforceable undertaking is to be made by the person or entity who holds the licence.

The EPA cannot require or compel a person to enter into an enforceable undertaking. Similarly, a person cannot compel the EPA to accept an enforceable undertaking.

The EPA does not have to commence legal proceedings before it can accept an undertaking.

Generally the EPA will only consider accepting an enforceable undertaking when:

- a. it believes that a breach of the Act has occurred or is about to occur; and
- b. it considers the undertaking to be an appropriate regulatory outcome having regard to the significance of the issues concerned to the environment and the community

Factors the EPA will consider when deciding whether accepting an enforceable undertaking is an appropriate regulatory outcome include:

- a. whether the person is likely to comply with it - the history of complaints against or breaches by and the general compliance record of the person, including any relevant previous court proceedings, will be relevant
- b. whether a person is prepared to acknowledge that the EPA has reason to be concerned about the alleged breach.
- c. the nature of the alleged breach and the regulatory impact of the undertaking compared to that of other forms of enforcement remedy
- d. the prospects of an expeditious resolution of the matter.

Offer of enforceable undertaking

A person wishing to offer the EPA an enforceable undertaking should raise it with an EPA officer. However that officer may not be authorised to accept the enforceable undertaking. Only the Director General and the Deputy Director General Environmental Protection and Regulation Group are authorised to accept enforceable undertakings.

Accepting enforceable undertakings

The EPA's acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a precedent. Every offer of an enforceable undertaking will be assessed on its merits.

An enforceable undertaking will not take effect until it is formally signed by the EPA's delegate (the Director General or the Deputy Director General Environment Protection and Regulation Group).

PART B: Acceptable and standard terms of enforceable undertakings

The EPA will only accept an enforceable undertaking when the person makes a positive commitment to:

- a. stop the particular conduct or alleged breach that concerns the EPA; and
- b. not recommence that conduct

An enforceable undertaking must also set out how the person will:

- a. address the conduct the EPA is concerned about; and
- b. prevent that conduct occurring again; and
- c. rectify the consequences of the conduct.

An enforceable undertaking must set out what the person is going to do to ensure that the conduct does not occur again. Examples include

- a. training of staff
- b. undertaking works to prevent a recurrence (including undertaking pollution studies and pollution reduction programs)
- c. requiring the person to implement a program to improve its overall compliance with the Act

In the case of an internal compliance program, the elements the EPA will require include:

- a. details of the monitoring and reporting mechanisms the person will adopt
- b. demonstrable Board and senior management commitment to, and involvement with, the entire program
- c. the assignment of responsibility for the compliance program to a named senior manager of the person;
- d. the development and dissemination throughout the organisation of a clear compliance policy;
- e. the identification of compliance issues and operating procedures for compliance;
- f. the development and delivery of a compliance training program to key personnel groups within the organisation;
- g. the establishment of permanent procedural checking and monitoring mechanisms, such as nominating a compliance officer and procedures to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management;
- h. the commitment to an independent audit of the compliance program at regular intervals (usually annually), for a specified period (usually 3 years).
- i. a requirement to report to the EPA at a specified time on the steps taken to implement the compliance program

The enforceable undertaking may also include:

- a. the name of a senior manager who is responsible for monitoring and complying with the undertaking; and
- b. the name of an EPA officer to whom the contact officer must report.

Generally the person giving the undertaking will be responsible for:

- a. monitoring how the undertaking is implemented; and
- b. reporting this to the EPA in the specified manner.

The way the person giving the undertaking proposes to do this must be set out in the undertaking and the EPA must be satisfied that this is adequate.

In resolving any matter the EPA wants to find ways to redress the alleged breach.

The EPA may also require an enforceable undertaking to state that the person will pay the EPA's costs incurred in conducting an investigation of the alleged breach.

The EPA will seek to ensure that enforceable undertakings and their development, implementation and monitoring are cost neutral to the EPA.

The EPA will take into account an undertaking in licensing matters under the Act.

Publicity and public access to undertakings

The EPA will not accept enforceable undertakings in confidence. The EPA's policy is that enforceable undertakings should be a matter of public record. Clause 63(1)(f) of the Protection of the Environment Operations (General) Regulation 1998 provides that details or summaries of enforceable undertakings must be recorded in the public register kept by the EPA.

The EPA will not make certain information in an undertaking available for public inspection if the person providing the undertaking asks that such information not be released and the EPA is satisfied that it:

- a. is commercial in confidence; or
- b. contains personal details of an individual

When the EPA makes a copy of an undertaking available on the public register with such confidential information deleted, the copy will include a note stating that certain information has been deleted.

The person providing the undertaking must acknowledge that it accepts the EPA's publicity and public access policy in the written undertaking.

Unacceptable terms

The EPA will not accept an undertaking if it contains a clause denying liability or it omits any of the standard clauses listed below.

The EPA will not accept an undertaking if it contains any clause that sets up defences for possible non-compliance with an enforceable undertaking.

Examples of standard terms

The following are examples of standard terms that will be included in every enforceable undertaking.

1. X acknowledges the EPA's concerns set out in this undertaking [or X acknowledges that it has breached eg section Y of the POEO Act].
2. X acknowledges that the EPA:
 - a. may issue a media release on execution of this undertaking referring to its terms and to the concerns of the EPA which led to its execution;
 - b. may from time to time publicly refer to this undertaking; and
 - c. will place a copy of this undertaking on the public register.

3. X acknowledges that the EPA's acceptance of this undertaking does not affect the EPA's power to investigate a contravention arising from future conduct, or pursue a criminal prosecution, or to lay charges or exercise other civil or regulatory powers under the Act.
4. X acknowledges that this undertaking does not affect the rights or remedies available to any other person or entity nor does it affect any statutory obligations under the POEO Act.
5. X acknowledges that this undertaking has no operative force until accepted by the EPA.
6. X acknowledges that this undertaking may only be varied in accordance with the POEO Act.
7. X acknowledges that these undertakings, as varied from time to time will remain in force until withdrawn in accordance with the POEO Act.

PART C: What happens if an enforceable undertaking is not complied with

If the EPA has reason to believe that a person has not complied with a term of an enforceable undertaking, the EPA may apply to the Land and Environment Court for appropriate orders. The EPA will make public its application to the Court and seek legal costs from the person who made the undertaking when appropriate. The orders which the Court can make are as follows:

- a. an order directing the person to comply with that term of the undertaking,
- b. an order directing the person to pay to the State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach,
- c. any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach,
- d. an order suspending or revoking any environment protection licence held by the person,
- e. an order requiring the person to prevent, control, abate or mitigate any actual or likely harm to the environment caused by the breach,
- f. an order requiring the person to make good any actual or likely harm to the environment caused by the breach,
- g. any other order the Court considers appropriate

A breach of an undertaking given to the EPA under s253A cannot itself be the subject of contempt proceedings. However, a breach of a Court order granted because of a breach of the enforceable undertaking may constitute a contempt of Court.

PART D: Varying or withdrawing enforceable undertakings

A person may withdraw or vary an enforceable undertaking only with the EPA's written consent: s253A(2) of the Act.

The EPA will only consider a request to vary an undertaking if it does not alter the spirit of the original undertaking, or where compliance with the original

undertaking is subsequently found to be impractical or where there has been a material change in the circumstances.

A factor relevant to the EPA's consideration of a person's request to withdraw an undertaking is whether the person's obligations under the undertaking have been fully performed.

The EPA will record withdrawals and variations on the public register.

It is not the EPA's policy to remove enforceable undertakings from the public register. An enforceable undertaking will remain on the public register after a person has fulfilled all the obligations of the undertaking.

Attachment A: Sample (hypothetical) undertaking

PROTECTION OF THE ENVIRONMENT OPERATIONS ACT 1997 **UNDERTAKING TO THE ENVIRONMENT PROTECTION AUTHORITY** **GIVEN FOR THE PURPOSES OF SECTION 253A**

BY

XYZ Pty Limited
ACN XXX.XXX.XXX

1. BACKGROUND

- 1.1. Full name of company including ACN (abbreviation of company name eg XYZ) or individual, and description of business activity, location of premises and any environmental protection licence held.
- 1.2. Description of the conduct that the EPA investigated.
- 1.3. Explanation of why the EPA considers the conduct to breach the Protection of the Environment Operations Act 1997.
- 1.4. Brief details of EPA inquiries.
- 1.5. An acknowledgement of the EPA's concerns and a statement that the conduct has stopped, eg:
XYZ acknowledges the EPA's concerns and states that it has now ceased the conduct referred to in paragraph 1.2 and has offered, and the EPA has accepted, the commitments in this enforceable undertaking.

2. UNDERTAKINGS

XYZ undertakes to the EPA for the purposes of s253A of the POEO Act:

2.1 it will.....

2.2 it will not.....

2.3 within three months of the signing of this undertaking, it will have in place a written compliance system, created and maintained at its own expense, to ensure that it complies with the conditions of its EPL/this undertaking.

2.4 within three months of the signing of this undertaking, it will nominate in writing to the EPA a director of XYZ and [or] an employee of XYZ who are responsible for ensuring that XYZ:

- (a) has the written compliance system in place;
- (b) communicates the nature and details of the written compliance system to XYZ officers and employees;
- (c) complies with the written compliance system;
- (d) reviews the effectiveness of the written compliance system every 6 months;
- (e) monitors compliance with the written compliance system;
- (f) records any breaches of the written compliance system in writing; and
- (g) corrects any breaches of the written compliance system.

3. ACKNOWLEDGEMENTS

3.1 XYZ acknowledges that the EPA:

- (a) may issue a media release on execution of this undertaking referring to its terms and to the concerns of the EPA which led to its execution;
- (b) may from time to time publicly refer to this undertaking;
- (c) will place a copy of the executed undertaking on the public register.

3.2 XYZ acknowledges that the EPA's acceptance of this undertaking does not affect the EPA's power to investigate a contravention arising from future conduct or pursue a criminal prosecution, or to lay charges or exercise other civil or regulatory powers under the Act.

3.3 XYZ acknowledges that this undertaking does not affect the rights or remedies available to any other person or entity nor does it affect any statutory obligations under the POEO Act.

3.4 XYZ acknowledges that this undertaking has no operative force until accepted by the EPA.

3.5 XYZ acknowledges that this undertaking may only be varied in accordance with the POEO Act.

3.6 XYZ acknowledges that this undertaking, as varied from time to time, will remain in force until withdrawn in accordance with the POEO Act.

EXECUTED on [day/month/year]

BY XYZ PTY LIMITED
Australian Company Number XXX XXX XXX

[Director – signature]

Director – Name and title (Block letters)

[Director – signature]

Director – Name and title (Block letters)

ACCEPTED BY THE ENVIRONMENT PROTECTION AUTHORITY OF NEW SOUTH WALES PURSUANT TO SECTION 253A OF THE POEO ACT BY ITS DULY AUTHORISED DELEGATE:

EPA Delegate’s name and title (Block Letters)

Signature

Date

Attachment B

Protection of the Environment Operations Act 1997 No 156

253A Enforcement of undertakings

- (1) The EPA may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the EPA has a function under this Act.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent in writing of the EPA. The consent of the EPA is required even if the undertaking purports to authorise withdrawal or variation of the undertaking without that consent.
- (3) The EPA may apply to the Land and Environment Court for an order under subsection (4) if the EPA considers that the person who gave the undertaking has breached any of its terms.
- (4) The Court may make all or any of the following orders if it is satisfied that the person has breached a term of the undertaking:
 - (a) an order directing the person to comply with that term of the undertaking,
 - (b) an order directing the person to pay to the State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach,
 - (c) any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach,
 - (d) an order suspending or revoking any environment protection licence held by the person,
 - (e) an order requiring the person to prevent, control, abate or mitigate any actual or likely harm to the environment caused by the breach,
 - (f) an order requiring the person to make good any actual or likely harm to the environment caused by the breach,
 - (g) any other order the Court considers appropriate.