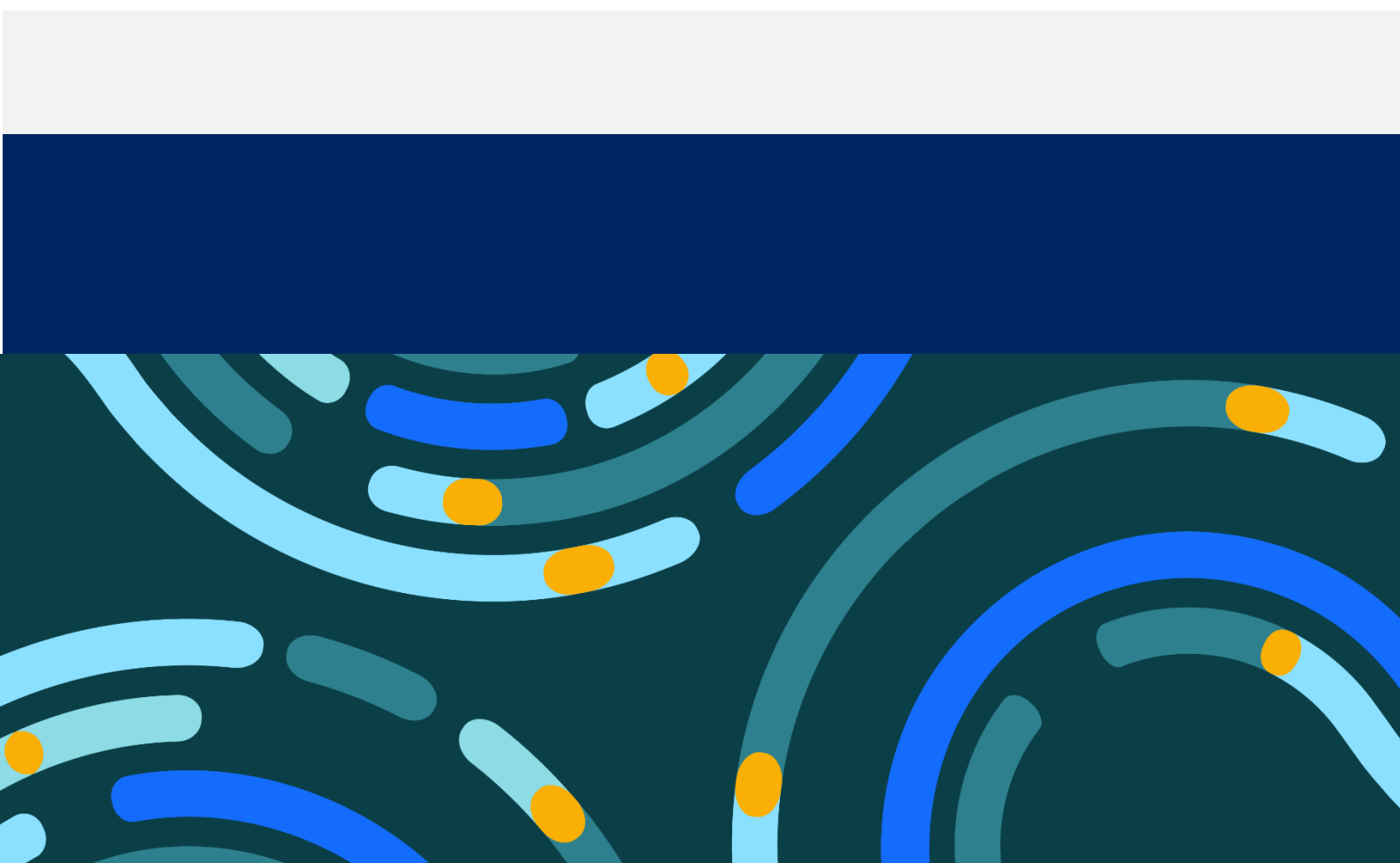

Natural Resources Access Regulator

nrar.nsw.gov.au



Enforceable undertaking guidelines

December 2023



Acknowledgement of Country

The Natural Resources Access Regulator acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land, and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

Published by the Natural Resources Access Regulator

nrar.nsw.gov.au

Title: Enforceable undertaking guidelines

First published: December 2023

Department reference number: DOC24/58875

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Introduction

The Natural Resources Access Regulator (NRAR) is an independent regulator established under the *Natural Resources Access Regulator Act 2017* (NRAR Act). We are responsible for ensuring the regulated community achieves compliance with natural resources management legislation including the NRAR Act, *Water Management Act 2000* (WM Act), *Water Act 1912* (Water Act) and associated regulations.

Section 336E of the WM Act (read with section 11 of the NRAR Act) empowers NRAR to accept enforceable undertakings from parties alleged to have breached the WM Act.

This document is a guide to proposing an enforceable undertaking (EU) to NRAR in relation to the WM Act, and explains EUs, their purpose, factors that will be considered in deciding to accept an enforceable undertaking, and possible terms of any negotiated enforceable undertakings.

What is an EU?

An EU is a voluntary and legally enforceable instrument that is proposed by a company or individual to NRAR, following an alleged contravention of the WM Act.

It is the responsibility of the company or individual to submit a proposed EU to NRAR. NRAR only considers accepting an EU if it contains clear details and commitments in response to an alleged breach, that deliver tangible benefits to the environment, communities and other water users, and includes:

- an acknowledgement of issues and impacts of the alleged contravention
- a commitment to implement initiatives that resolve the behaviour of concern that caused the alleged contravention
- a commitment to implement initiatives to rectify the impacts or consequences of behaviour.

Once accepted by NRAR, the company or individual is obligated to carry out the specific activities outlined in the EU and these are published on our website and form part of the compliance history of a company or individual.

An EU does not override or remove a company or individuals' other legal obligations.

What are the benefits?

An EU allows a company or individual to acknowledge issues identified in relation to an alleged contravention and provide an opportunity to arrive at a mutually agreed resolution to compliance matters.

An EU is typically accepted as an alternative to court proceedings. An EU offers more flexible environmental and community outcomes than can be achieved in court proceedings and is typically less costly than court proceedings.

An EU must reflect and promote the objects and water management principles of [s 5\(2\) of the WM Act](#) and align with NRAR's objectives set out in [section 10 of the NRAR Act](#). An EU can offer innovative activities that bring benefits to the local environment and communities through:

- allocating funds to an existing or new project that improves the local environment or benefits the local community
- commitments to additional measures that would exceed minimum compliance requirements or achieve outcomes different to those that that can be achieved by progressing legal court proceedings
- better water management, environmental and cultural practices
- providing deterrence similar or in excess of that able to be achieved through court proceedings
- typically providing a more timely resolution to compliance issues with reduced costs to NRAR and the taxpayer
- informing the community generally about the consequences of the alleged contravention and the opportunities that improved overall compliance can bring.

What are the factors NRAR considers in accepting an EU?

This section sets out the specific factors NRAR considers when evaluating if an undertaking is an appropriate response in the circumstances.

Generally, NRAR will only consider accepting an EU when:

- it considers that there has been a breach of the WM Act and the issues involved are serious
- it considers it is consistent with ensuring effective, efficient, transparent and accountable enforcement of the WM Act
- it considers it reflects and promotes the water management principles set out in [s 5\(2\) of the WM Act](#)
- it offers the best solution where a prosecution or civil proceedings may not achieve the desired outcomes or be in the best interests of the public
- the proponent acknowledges issues and impacts of the alleged breach
- acceptance of the EU will produce the best results for lasting compliance
- the proposal is submitted within one month of the proponent being notified of preliminary investigation findings.

Where relevant, in deciding whether to accept an EU, NRAR also has an obligation to give priority to the water sharing principles in the order set out in [s 5\(3\) of the WM Act](#).

If these factors are present, NRAR will assess a proposed EU on a case-by-case basis to determine if it is the most effective and appropriate regulatory outcome. NRAR will consider factors outlined in NRAR's Regulatory Policy such as:

- 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
- ability of the EU to remedy the impacts of the contravention on the community and environment
- good faith of the company/individual involved
- prospect for rapid resolution of the matter.

A proposed EU can be considered once preliminary investigation findings have been reached. An EU can be accepted as an alternative to, or in conjunction with other enforcement action.

In cases where an EU is accepted as an alternative to other enforcement action, the other enforcement action will not be commenced in relation to the breach the subject of the EU. If a prosecution or civil proceedings have commenced in relation to the breach of the WM Act, in these cases, all reasonable steps will be taken to discontinue the proceedings as soon as possible after an EU has been accepted.

How do I propose an EU?

Before proposing an EU under the WM Act, it is recommended that a company or individual consider these guidelines and consult with NRAR and obtain a copy of the EU template by contacting eucoordination@nrar.nsw.gov.au. Conversations or consultation associated with the proposal of an EU are generally conducted on a confidential and no obligation basis.

The EU template should be used to propose an EU. The proposal must provide relevant information and outline the proponent's commitments in a clear and concise manner to enable NRAR to assess whether the offer is appropriate, achievable and enforceable.

Guidance on the contents of an EU proposal is provided below at 'What information should an EU include?'

What are the timeframes for submission?

A company or individual considering an EU must negotiate a timeframe for submission of the proposal and actions to remedy the alleged breach. Generally, the proposal must be submitted within one month of the proponent being notified of preliminary investigation findings.

Early agreement on acceptable timeframes is essential to ensure timely consideration of the proposal. Unless there are exceptional circumstances, negotiations on the contents of the undertaking should be completed within three months of NRAR providing feedback on the initial proposal, subject to the status of NRAR's investigation. An EU may be refused if there is an unreasonable delay in proposing it, finalising negotiations, or if timeframes to remedy the breach are unreasonable.

Investigations will continue until a proposed EU is accepted.

What should an EU include?

The content of the proposal for an enforceable undertaking depends on the nature of the alleged contravention and the actions that are proposed to remedy the matter.

An enforceable undertaking **must include** the following details:

- particulars about the company or individual proposing the undertaking
- details of the alleged contravention
- an acknowledgment of the alleged breach
- an acknowledgment of the seriousness of any harm including potential harm to the environment or community
- a positive commitment to cease the conduct that caused the alleged breach
- terms of the proposed undertaking (including specific details of remedies offered, timeframes to implement and the process to audit or verify their implementation)
- positive reporting requirements to NRAR including providing information to verify compliance if requested
- specific commitments on future actions to prevent recurrence and improve compliance
- an acknowledgement that NRAR will make the EU publicly available including by publishing it on NRAR's website
- an acknowledgement that NRAR will, from time to time, make public reference to the EU including in news media statements and in NRAR's publications
- an acknowledgement that the EU in no way derogates from the rights and remedies available to any other person arising from the alleged conduct
- an acknowledgement that the EU does not affect the ability of NRAR to take any other enforcement action for the contravention or alleged contravention of the WM Act to which this undertaking relates
- an acknowledgement that any publicity or public reporting undertaken by the proponent about the substance of any undertaking in an EU must specify that this is an obligation under an EU with NRAR
- an acknowledgement that the proponent has disclosed to NRAR any relationship with the beneficiary of an undertaking in the EU (e.g. the recipient of a grant or funds)
- an acknowledgement that a third party cannot be bound by any undertaking in an EU and that the proponent remains responsible for ensuring that all undertakings in the EU are satisfied
- an acknowledgement that the proponent is responsible for ensuring it is aware of any legal requirements that may apply to commitments in the EU and for obtaining relevant approvals.

For NRAR to consider an EU as an appropriate alternative to other enforcement action, the proposal should generally address the following elements:

- a financial contribution as payment for any alleged unlicensed water take and/or in recognition of any alleged breaches

- a commitment to additional measures that exceed minimum compliance standards
- a donation to, or funding of, a community project or initiative that is aligned with the general water management principles of the WM Act and/or NRAR's enduring and annual priorities that provide long-term environmental or community benefit
- specific actions related to addressing any Aboriginal or other cultural impacts or harm that may have occurred as a result of the alleged breach or activities that relate to the recognition of Aboriginal cultural values and their connection to land and water
- where appropriate, reimbursement of reasonable costs in accepting the EU, including NRAR's investigation and/or legal costs, costs of reviewing the proposal and monitoring compliance with the undertaking during which it is in force.

What are some examples of an EU proposal?

NRAR encourages innovative EU proposals that reflect and promote the water management principles in the WM Act. Additional or alternate measures/commitments will be considered if they provide appropriate benefits to the impacted community or environment or promote general compliance. Some examples include:

- conducting, facilitating, or funding research, education programs or scholarships that align with NRAR's annual or enduring regulatory priorities, including our commitment to preserving and protecting our cultural heritage sites of significance, and/or that promote the principles of the WM Act
- implementing industry specific education or staff training programs regarding water management and regulatory compliance
- conducting promotional and education campaigns targeting specific water compliance issues
- assisting in, or funding, the development of industry standards or codes of practice, reflecting and promoting the water management principles of the WM Act and/or NRAR's annual and enduring priorities.

For further information and guidance, NRAR's website contains case studies, and details of EUs accepted by NRAR are published to the NRAR public register.

What cannot be included in an EU?

An EU cannot include:

- any denial of liability
- statements that an EU is not an admission for the purposes of third-party action
- terms that set up defences for possible non-compliance with the EU
- terms that may impose an obligation on NRAR
- any terms that may set up defences for possible future contraventions of the WM Act

- terms that impose obligations on a third party
- statements that the conduct is inadvertent or self-serving statements seeking to minimise the consequences of the alleged contravention
- submissions on why prosecution or other enforcement action should not be commenced or why the EU should be accepted.

How does NRAR assess proposed EUs?

Each proposal for an EU will be considered on a case-by-case basis. NRAR will assess the proposed EU in terms of the statutory objectives in the WM Act and NRAR Act, decision-making principles of its Regulatory Policy and alignment with, and promotion of, the water management principles outlined in the WM Act.

NRAR may seek expert independent advice during the process. If necessary, negotiations with the company or individual proposing the EU will be conducted regarding the inclusion or refinement of specific terms on a confidential no obligation basis.

Although an offer of an EU can be made at any time, NRAR will generally only be in a position to consider an offer once preliminary investigation findings have been reached.

How is the outcome of a proposal finalised?

NRAR's Enforcement Committee reviews proposed EUs and provides advice to the Chief Regulatory Officer (CRO) or other delegated NRAR officer before any formal decision is made to accept or reject an EU.

Written notice of the decision to accept or reject the EU will be given to the company or individual submitting the proposed enforceable undertaking. The written notice will provide reasons for the decision.

In circumstances where NRAR intends to reject the proposed EU, NRAR will issue a letter to the proponent outlining its intention to refuse the offer and the reasons for the proposed decision. The proponent will be provided a final opportunity to address these concerns prior to the determination.

An EU will not take effect until:

- it is signed by those with appropriate authority on behalf of the proponent
- it is accepted and signed by the CRO or other delegated officer of NRAR.

Noting that, a later starting date for commencement of an EU may be specified, if necessary.

Are EUs made public?

When an EU is accepted or rejected, a notice of the decision, and the reasons for that decision will be made public and published to the NRAR website.

The terms of EUs are a matter of public record and details of all EUs that have been accepted will be published to NRAR's public register within 14 days of the date of the decision. NRAR will also, from time to time, make public reference to the EU including in news media statements and in NRAR's publications.

EUs will not be accepted in confidence. However, certain information in an EU will be withheld from the public if the company or individual requests certain information not be released, and NRAR is satisfied that it:

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

If a copy of an EU is made publicly available with such confidential information deleted, the published copy will state that certain information has been redacted.

In some circumstances, it may also be considered appropriate to publicise a decision not to accept a proposed EU.

What happens when there is non-compliance with an EU?

Compliance with the terms of an EU will be strictly monitored by NRAR.

An EU is legally enforceable and if the EU is breached NRAR may consider taking enforcement action, rather than enforcing the undertaking itself.

Contravening an EU is considered very serious and NRAR may apply to the court for orders as follows:

- to comply with a term of the EU
- to pay the state an amount representing the financial benefit gained as a result of the breach of the EU
- to compensate any other person who has suffered loss or damage as a result of your breach of the enforceable undertaking
- to prevent, control, abate or mitigate any actual or likely harm to the environment caused by the breach of the enforceable undertaking
- any other order the Court considers appropriate.

Varying or withdrawing an EU

A company or individual may seek NRAR's consent to withdraw or vary an EU. A request to vary an EU will only be considered if:

- it does not alter the intent of the outcomes sought by the original enforceable undertaking
- NRAR's delegate accepts there has been a material change in circumstance.

An EU will not be varied to address another, separate contravention of the WM Act. Variations or withdrawals of an EU will only take effect with the written consent of NRAR's delegate. If NRAR's delegate consents to withdraw from an EU, NRAR may continue to pursue alternative enforcement action.

Variation or withdrawals of an enforceable undertaking 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.