



Natural Resources Access Regulator

Enforceable Undertakings Guideline

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1 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 the NRAR to accept enforceable undertakings from parties alleged to have breached the WM Act.

This document is a guide to proposing an enforceable undertaking to the NRAR in relation to the WM Act 2000, and explains Enforceable undertakings, their purpose, factors that will be taken into account in deciding to accept an enforceable undertaking, and possible terms of any negotiated enforceable undertakings.

2 Enforceable undertaking

An enforceable undertaking (undertaking) is a voluntary and legally binding agreement 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 undertaking to NRAR. Undertakings provide scope for innovative outcomes and may offer an efficient alternative to costly and lengthy court processes or other enforcement action. These initiatives should seek to remedy the behaviour of concern that has led to the alleged contravention.

The agreement contains clear details of the commitments by the company or individual, in response to the alleged breach. Once accepted by NRAR, the company or individual is obligated to carry out the specific activities outlined in the undertaking.

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

3 Factors to be considered in accepting an undertaking

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

Generally, the NRAR will only consider accepting an enforceable undertaking when:

- it considers you have breached the relevant Act and the issues involved are serious;
- resolution by undertaking 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;
- you take responsibility for your actions, omissions or conduct in relation to the alleged breach; and
- acceptance of the undertaking will produce the best results for lasting compliance and remedies.

The NRAR will assess whether an undertaking is an appropriate regulatory outcome by considering the factors outlined below.

Enforceable undertaking proposals will be considered if it can be demonstrated to be the most effective and appropriate regulatory outcome in the circumstances, with regards 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 the complaints received;
- ability of the undertaking to remedy the impacts of the contravention on the community and environment;
- good faith of the company/individual involved; and
- prospect for rapid resolution of the matter.

An enforceable undertaking proposal can be considered, without a prosecution, civil proceedings or other enforcement action having commenced. If 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 undertaking. If a prosecution or civil proceedings have commenced, all reasonable steps will be taken to discontinue the proceedings as soon as possible after an enforceable undertaking has been accepted.

4 Proposing an enforceable undertaking

To propose an enforceable undertaking, it is recommended to use the [template provided on the website](#). The proposal must provide relevant information and the proponent's commitments must be clear and easy to understand.

5 Timeframes

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

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

6 Contents of an undertaking

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.

In general, an enforceable undertaking must include:

- particulars about the company or individual proposing the undertaking;
- details of the alleged contravention;
- an acknowledgment or admission that the conduct constitutes or was likely to constitute a breach of the Act;
- an acknowledgment 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, 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;
- future actions to prevent recurrence and improve compliance programs; and
- acknowledgement the NRAR will make 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 NRAR 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 enforceable undertaking cannot include:

- Any denial of liability;
- Statements that undertaking is not admission for purposes of third-party action;
- Terms that set up defences for possible non-compliance with the undertaking;
- Terms that may impose an obligation on the NRAR;
- 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 seeking to minimize consequences of the conduct; and
- Submission on why prosecution or other enforcement action should not be commenced or why the undertaking should be accepted

7 Reviewing the proposed undertaking

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

The NRAR will conduct a review of the proposal when received and may seek expert independent advice during the process. The review takes into account the nature of the alleged contravention, whether an undertaking is an appropriate regulatory response and the appropriateness of the action(s) proposed by the company or individual.

If necessary, negotiations with the company or individual proposing the enforceable undertaking will be conducted regarding the inclusion of specific terms on a without prejudice basis.

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

8 Finalising the proposal

Written notice of the decision to accept or reject the enforceable undertaking will be given to the company or individual submitting the enforceable undertaking proposal. The written notice will justify the decision.

An enforceable undertaking will not take effect until it is accepted and signed by the Chief Regulatory Officer (CRO) of the NRAR, and the outcome of the decision is communicated to the company or individual who proposed the undertaking. A later date for commencement may be specified, if necessary.

9 Publication of enforceable undertakings

When an enforceable undertaking is accepted, a notice of the decision to accept it, and the reasons for that decision will be made public. The terms of enforceable undertakings are a matter of public record and details of all enforceable undertakings that have been accepted will be published. The NRAR will publish any accepted undertakings and the reasons for the decision on its website within 14 days of the date of the decision.

Enforceable undertakings will not be accepted in confidence. However, certain information in an enforceable undertaking will be withheld from the public if the company or individual requests certain information not be released, and the NRAR 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 deleted, the published copy will that certain information has been redacted.

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

10 Failure to comply with an enforceable undertaking

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

An enforceable undertaking is a legally binding agreement and non-compliance is subject to strict penalties. Contravening an enforceable undertaking is considered a very serious offence and the NRAR may take a number of approaches. For example, the NRAR may apply to Court for orders as follows:

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

11 Varying or withdrawing an undertaking

A company or individual may apply to withdraw or vary an enforceable undertaking. 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; and
- 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 CRO of the NRAR. If withdrawal from an undertaking is accepted, NRAR will continue to pursue appropriate compliance 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.