



# Enforceable undertakings

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An enforceable undertaking is a voluntary but binding agreement under the *Fair Work (Registered Organisations) Act 2009* (RO Act) that is negotiated between a person or entity and the General Manager of the Fair Work Commission (the Commission). Breaches of an enforceable undertaking may be enforced in court. The enforceable undertaking can be directed towards:

- non-compliance that has occurred
- preventing future non-compliance.

Enforceable undertakings are an enforcement and regulatory tool that provide:

- tailored and flexible resolutions to compliance issues
- opportunity for the party to be involved in the resolution
- a certain, cost-effective and timely outcome.

The General Manager or their delegate can accept an enforceable undertaking under Part 4 of Chapter 10 of the RO Act and Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act).

## Using enforceable undertakings

An enforceable undertaking may be appropriate when:

- we have identified compliance concerns, and
- the person is prepared to address the compliance concerns voluntarily, and
- it is an effective and appropriate outcome that is in the public interest.

We may accept an enforceable undertaking instead of, or in addition to, other formal enforcement actions, such as litigation. In considering whether to do so, we take into account the factors outlined in our [Compliance and Enforcement Policy](#) and whether an enforceable undertaking will:



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- be a proportionate and appropriate response in relation to the nature and circumstances of any compliance concerns, including their seriousness, and any relevant compliance history of the person or organisation or other relevant circumstances
- provide an adequate deterrence against future misconduct by the person and by other organisations
- further the objectives of the RO Act including by promoting the efficient management and democratic functioning and control of organisations and embedding within the organisation a culture of good governance and voluntary compliance with the law
- be in the best interests of the members of the organisation, and the public interest.

We may consider an enforceable undertaking at any time.

We will not usually accept an enforceable undertaking from a party:

- that requires confidentiality
- where the misconduct is deliberate or involves a high level of recklessness
- instead of undertaking an investigation that the RO Act requires us to conduct (such as where an auditor has provided a qualified audit report to an organisation)
- if it is not an effective deterrent or where civil penalty proceedings are more appropriate in the public interest, or
- instead of referring information to another more appropriate agency in circumstances where information acquired by the General Manager or the staff of the Commission is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory by that other agency.

## Drafting and signing an enforceable undertaking

We will prepare the draft enforceable undertaking. The party to the enforceable undertaking can seek independent legal advice and provide input that it might wish us to consider before signing the enforceable undertaking.



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## Common terms

Our enforceable undertakings include a written commitment from the person giving the undertaking to take specified action to stop the conduct or non-compliance in question, and not recommence it.

An enforceable undertaking will typically contain additional obligations, which include:

- an acknowledgement that the party making the undertaking has not complied with the RO Act
- the party to the enforceable undertaking is prepared to voluntarily remediate the issue
- specific actions the party to the enforceable undertaking must take to address the contravention (for example alter its rules by a certain time, lodge or amend documents required by legislation, etc.)
- preventative and remedial actions for the future (for example, alter rules of the organisation or branch, conduct an internal audit procedure, implement policies and procedures in accordance with the Commission's [Good Governance Guide](#), demonstrate remorse, issue a public notice, undertake training, or make a contrition payment etc).

## Publishing enforceable undertakings

The General Manager will usually publish an enforceable undertaking on the Commission's website.

## Varying enforceable undertakings

An enforceable undertaking that has been given by a person may be cancelled, withdrawn or varied at any time, but only with the written consent or notice by the General Manager.

## Monitoring compliance

Monitoring compliance with undertakings is central to their credibility. Depending on the enforceable undertaking requirements, the person giving the undertaking should expect:

- the Commission to check in on their progress
- to monitor their own compliance with the enforceable undertaking
- to proactively and routinely report to the Commission on compliance with the undertaking and any progress being made



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- to provide evidence of implementation of changes and any independent reports required by the enforceable undertaking.

Monitoring and reporting will usually occur through a compliance monitoring plan. We will work with the person and provide support to ensure best practice governance and voluntary compliance.

## Concluding an enforceable undertaking

When we are satisfied that all the elements of the enforceable undertaking are complete, a letter will be sent informing the person giving the undertaking.

We expect the person giving the undertaking to maintain high levels of compliance once an undertaking is completed. A party to an undertaking can expect us to take stronger regulatory action in line with our Compliance Policy for education, monitoring and enforcement activities if further non-compliance occurs.

## Non-compliance

Failure to comply with the agreed terms of an enforceable undertaking is a serious matter. If we consider that a person has breached an enforceable undertaking we may apply to a relevant court for orders enforcing it.

The outcomes include:

- directing the person to comply with the enforceable undertaking
- paying to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach
- compensating any other person who has suffered loss or damage because of the breach or any other order that the court considers appropriate.

## Further information

If you require further assistance regarding the information in this guidance note please contact the Registered Organisations Services Branch of the Fair Work Commission at [regorgs@fwc.gov.au](mailto:regorgs@fwc.gov.au) or call us on 1300 341 665.

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This guidance note is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.