



Guidelines for enforceable undertakings

Office of Environment and Heritage

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Published by:

Office of Environment and Heritage
59 Goulburn Street, Sydney NSW 2000
PO Box A290, Sydney South NSW 1232
Phone: +61 2 9995 5000 (switchboard)
Phone: 1300 361 967 (OEH and national parks enquiries)
TTY users: phone 133 677, then ask for 1300 361 967
Speak and listen users: phone 1300 555 727, then ask for 1300 361 967
Email: info@environment.nsw.gov.au
Website: www.environment.nsw.gov.au

Report pollution and environmental incidents
Environment Line: 131 555 (NSW only) or info@environment.nsw.gov.au
See also www.environment.nsw.gov.au

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1. Introduction

The NSW Office of Environment and Heritage (OEH) administers a range of legislation that together protect the natural environment and heritage in New South Wales. These include the *Biodiversity Conservation Act 2016* (the BC Act); Part 5A of the *Local Land Services Act 2013* (the LLS Act); the *Native Vegetation Act 2003*; and parts of the *National Parks and Wildlife Act 1974*.

OEH has several regulatory options available when implementing or enforcing environmental legislation. The Chief Executive of OEH can choose to accept an enforceable undertaking under section 13.27 of the BC Act. These guidelines are to be taken into account in considering any enforceable undertaking proposal. OEH will also refer to its *Compliance Policy*, which describes the aims of compliance and enforcement and the regulatory tools available, and *OEH Prosecution Guidelines*, which outline the factors considered when prosecution is determined to be the appropriate regulatory response to an alleged breach.

This document is to be used when proposing or considering whether to accept an enforceable undertaking in relation to matters under the Acts listed. It discusses the purpose of enforceable undertakings, possible terms of any negotiated enforceable undertaking, and the factors considered when deciding whether to accept an enforceable undertaking.

2. What is an enforceable undertaking?

An enforceable undertaking is a voluntary and legally binding written agreement between OEH and another entity ('you'). The agreement is proposed by you and should commit to the implementation of actions that deliver tangible benefits for the environment and community. An enforceable undertaking is an alternative to costly and lengthy court processes and aims to achieve efficient and innovative outcomes. An enforceable undertaking should seek to achieve improved conservation outcomes and address any behaviours that may have led to the alleged contravention.

The onus is on you to apply. However, OEH may suggest that you consider submitting an enforceable undertaking proposal if appropriate.

An enforceable undertaking may be accepted by the Chief Executive of OEH under a range of circumstances. For example, it can be adopted to achieve restorative justice where there has been an alleged breach of legislation. In this instance, it presents an alternative compliance action to prosecution; i.e. there is no criminal conviction.

If your enforceable undertaking proposal is accepted by OEH, you are obliged to carry out the specific activities outlined in the undertaking. The details of all agreed enforceable undertakings are listed on an OEH public register (see section 5 – Publication of enforceable undertakings).

Why an enforceable undertaking?

OEH follows a graduated approach to compliance and enforcement to protect the environment and heritage of New South Wales, as described in the OEH *Compliance Policy*. While every effort is made to provide appropriate information and advice, OEH will enforce compliance through the regulatory measures available to it, as appropriate to the circumstances.

There are many circumstances where OEH may accept an enforceable undertaking when administering legislation, including as an alternative to prosecution if appropriate to the

nature and seriousness of the alleged breach. Enforceable undertakings allow you to prepare a proposal that genuinely acknowledges and responds to the seriousness of an alleged contravention, and to cooperate with the OEH in response to that incident.

Enforceable undertakings provide an opportunity to arrive at a mutually agreed resolution to a compliance issue and may be a preferred approach if it is expected this may achieve outcomes that cannot generally be achieved through a court order. The range of actions available through an enforceable undertaking can be tailored to the nature of the non-compliance, be more systematic and enduring, and provide broader benefits to the community and environment.

Proposing an enforceable undertaking does not constitute an admission of guilt by you in relation to an alleged incident. The proposal can be considered before prosecution, civil proceedings or other enforcement action (including remediation orders) have commenced.

Who can accept or reject an enforceable undertaking?

While the proposal for the enforceable undertaking is developed by you, the decision whether to accept or reject your proposal is made by OEH.

3. What determines whether an enforceable undertaking will be accepted?

Key principles

OEH will only accept an enforceable undertaking as an alternative to prosecution if it is able to demonstrate benefits that align with at least two of the three key principles below:

- 1. Environmental benefits:** For example, establishment of set-asides as per the *Land Management Code* (the Code); restoration or remediation of native vegetation; entry into a covenant over land for the conservation of biodiversity, or allocation of funds to research opportunities or programs in relation to plant or animal communities.
- 2. Community benefits:** For example, payment of funds to a local Landcare or community group; training or employment opportunities for local community, or funding tertiary scholarships for environmental students in consultation with relevant universities.
- 3. Positive behaviour change in the regulated community:** For example, implementing a program to improve your overall compliance with the BC Act or LLS Act (i.e. implementing an internal compliance program); participation in and/or funding of education and awareness initiatives, or actively engaging in industry forums to communicate the outcomes of the enforceable undertaking and/or knowledge gained through complying with its terms.

Acceptance of undertaking

Each enforceable undertaking proposal will contain a unique set of facts and circumstance and will be considered by OEH on a case-by-case basis.

While the proposal is developed by you, it is recommended that you consult OEH before proposing an enforceable undertaking. Your first point of contact should be your local regional OEH compliance unit. Our staff will be able to provide sufficient information to help you decide whether proposing an enforceable undertaking is an appropriate path. The compliance team will also explain the submission, negotiation and acceptance processes,

the factors taken into account when considering a proposal, and the scope of activities likely to be required within a proposed undertaking.

Conversations or consultation associated with a proposal for an enforceable undertaking are conducted on a 'without prejudice' basis. Any assistance provided by OEH is not a guarantee that the proposal will be accepted. We suggest that you also obtain independent legal advice.

Any investigations into alleged contraventions will continue until a proposal is accepted.

Attachment A contains a detailed, but not exhaustive, list of potentially relevant factors in considering an enforceable undertaking proposal.

Role of other agencies in native vegetation management

You may also wish to consult other agencies or organisations in formulating your enforceable undertaking proposal. For example, if your proposal suggests including land management activities to remediate or restore native vegetation, NSW Local Land Services (LLS) or Greening Australia may be able to provide guidance on what is appropriate. Similarly, the Biodiversity Conservation Trust may be able to advise on the possibility of entering into a stewardship agreement as part of your proposed undertaking.

Alternatively, agencies such as LLS may assist you to initiate a proposal to OEH as part of negotiating an enforceable undertaking. Similarly, where you have identified a proposed way forward with OEH, LLS may work with both parties to identify opportunities to achieve outcomes consistent with legislated land management provisions.

Any advice sought can be provided to you directly, or to OEH if requested by you.

4. Proposing an enforceable undertaking

Upon receiving a proposal for enforceable undertakings, OEH will commence negotiating the final enforceable undertaking. There may be instances where OEH is already undertaking investigations and may make you aware of the option of proposing an enforceable undertaking. This, however, does not suggest that OEH will accept the undertaking.

Contents of the undertaking

The specific terms to be included in an enforceable undertaking will vary depending on the circumstances and the actions proposed. In general terms, an undertaking must include:

- particulars about the company or individual proposing the undertaking
- details of any alleged contravention
- an acknowledgement of any conduct that may constitute or is likely to constitute a breach of relevant legislation
- an acknowledgement of the seriousness of any harm, including potential harm, to the environment or community
- a positive commitment to cease the conduct
- specific details of remedies offered and processes to audit or verify their implementation
- commitment to participate constructively in compliance monitoring activities, including providing information to OEH to verify compliance upon request
- future actions to prevent recurrence and improve compliance

- an acknowledgement that OEH will make the undertaking publicly available and may refer to it in media or publications.

An enforceable undertaking cannot include:

- any denial of liability
- terms that set up defences for possible non-compliance with the undertaking
- terms that may impose an obligation on OEH
- any terms that may set up defences for possible further contraventions of the BC Act, LLS Act or any other legislation
- terms that impose obligations on a third party
- submissions on why prosecution or other enforcement action should not commence or why the undertaking should be accepted.

The commitments and obligations proposed for an undertaking must be clearly articulated, measurable and enforceable. Obligations must be drafted in a prescriptive way that details how obligations will be met, measures against which completion will be assessed and timeframes within which actions will be commenced and completed.

It is recommended you contact OEH prior to suggesting an undertaking that includes a project to deliver local environmental or community benefits. OEH may provide advice on additional or alternative considerations you could address or may be aware of a potential project for this component of your proposal.

You may also be required to include a commitment to reimburse OEH's reasonable costs in accepting the proposed enforceable undertaking. This may include costs such as those involved in investigating the original offence, reviewing the proposal or monitoring compliance with the undertaking while it is in force.

Enforceable undertaking templates

Templates for enforceable undertakings under the BC Act are provided at **Attachment B**. While not compulsory, OEH recommends that you use these templates to prepare an enforceable undertaking proposal. If you choose not to use these templates, you should ensure that information and commitments provided are clear and easy to understand.

Timeframes

When proposing an enforceable undertaking, you should negotiate a timeframe with OEH to submit the proposal. Early agreement on acceptable timeframes is essential to ensure timely consideration of the proposal. Provision of prompt, considered and comprehensive information is key to the successful negotiation of an appropriate enforceable undertaking.

While an enforceable undertaking proposal is being negotiated, OEH will continue to investigate any relevant alleged contraventions of legislation. In circumstances where OEH accepts an undertaking in lieu of prosecution or other compliance action, OEH may seek payment for its investigation and legal costs as part of an enforceable undertaking. Protracted negotiations involved in developing an enforceable undertaking may result in costs incurred by OEH, which may reasonably be reconciled within a finalised enforceable undertaking.

Review

OEH will review proposals and may seek independent advice during this process. The review process will involve consideration of the merit of each proposal, with reference to the

nature and facts of the circumstances, any alleged contraventions and the appropriateness of the actions proposed. For example, review of the proposal may involve consideration of the causes of any incident, the extent to which you had control or responsibility for these causes, your actions after the incident and your compliance history.

The review process seeks to determine whether the enforceable undertaking is an appropriate regulatory response by adequately addressing the alleged contravention/s, securing compliance with the relevant legislation and delivering tangible benefits for the environment and broader community.

Negotiation of terms

If appropriate, OEH will negotiate with you to ensure the terms of the enforceable undertaking are consistent with achieving the key principles outlined in Section 3 of these guidelines.

Finalising the proposal

An enforceable undertaking will not take effect until it is accepted and signed by the Chief Executive of OEH or other delegated officer. A later date for commencement may be specified, if necessary.

5. Publication of enforceable undertakings

Once accepted, the terms of enforceable undertakings are a matter of public record. OEH will publish details of all enforceable undertakings on its website within 14 days of acceptance. The published details will include, at minimum:

- reference to the alleged breach of legislation
- a summary of undertaking actions
- reasons for accepting the undertaking
- date of acceptance by OEH.

The terms of an enforceable undertaking will not ordinarily be kept confidential. However, if requested by you, certain information will not be made public where OEH is satisfied that it:

- is commercial in confidence
- contains personal details of an individual
- it is in the public interest to do so.

Where such confidential information is withheld, the published copy of the enforceable undertaking will include a note stating that certain information has been redacted.

6. Compliance

OEH will monitor compliance with the terms of an enforceable undertaking.

Where an investigation finds that there has been non-compliance with the undertaking, OEH will take enforcement action, such as applying to the court for appropriate orders. Amongst other things, the court can order you to:

- comply with the terms of an undertaking

- pay the state an amount not exceeding any financial benefit you obtained and is attributable to a relevant breach
- compensate any other person that suffered loss or damage resulting from a relevant breach
- prevent, control, abate or mitigate any actual or likely damage to animals, plants, habitat, or to a declared area of outstanding biodiversity value caused by a relevant breach
- make good any actual or likely damage to animals, plants, habitat, or to a declared area of outstanding biodiversity value caused by a relevant breach.

7. Varying or withdrawing enforceable undertakings

You may apply in writing to the Chief Executive of OEH for consent to withdraw or vary an enforceable undertaking. Requests to vary or withdraw an enforceable undertaking will only be considered if:

- the principles and objectives of the original undertaking are unaltered
- compliance with the original undertaking is found to be impractical
- there has been a material change in circumstances.

Variations or withdrawals of an enforceable undertaking will only take effect when authorised and signed by the Chief Executive of OEH.

Withdrawals of, and variations to, enforceable undertakings will be published. Enforceable undertakings will remain on the public register after a company or individual has discharged all obligations under the undertaking.

8. Attachments

Attachment A: Factors considered when evaluating an enforceable undertaking

Factors considered that are relevant to...	An enforceable undertaking is more likely to be accepted when...
Nature of any alleged breach	<ul style="list-style-type: none"> • it was an accident or was caused inadvertently • it was an isolated or one-off occurrence • it was not committed or motivated by commercial gain or profit • it occurred despite high standards of operation • the cause of the alleged breach was not reasonably foreseeable • its impact or risk of impact was not reasonably foreseeable
Impact of any alleged breach	<ul style="list-style-type: none"> • the extent of environmental harm was limited • the action could be permitted under the Land Management Code or remediated through additional steps (e.g. set-asides, or remediation)
History of party	<ul style="list-style-type: none"> • you are likely to comply with the enforceable undertaking • you have no history of serious prior non-compliances with environmental legislation or similar legislation
Conduct of party	<ul style="list-style-type: none"> • you notified OEH of the incident promptly after becoming aware of it • your remediation response or proposal was/is prompt, genuine, effective and reasonable • you voluntarily submitted a proposed enforceable undertaking application with complete and detailed information • you have demonstrated a commitment to ensuring your ongoing compliance with the relevant legislation • you demonstrated genuine contrition in relation to the incident • you genuinely cooperated in response to the incident and OEH's investigation
General circumstances	<ul style="list-style-type: none"> • there are good prospects for rapid resolution of the matter • the investigation is at an early stage

Attachment B: Example enforceable undertaking template

Given under section 13.27 of the *Biodiversity Conservation Act 2016 (NSW)* by [Individual/Company] and [ACN or ABN].

1. Person(s) giving the Undertaking

1.1 This Undertaking is given to the Office of Environment and Heritage (OEH) by [insert full name of Individual/Company] ACN [insert ACN or ABN], for the purposes of section 13.27 of the *Biodiversity Conservation Act 2016 (NSW)*

2. Background

2.1 [Description of an individual's or Company's business and activities relevant to investigated conduct]

2.2 [Description of the conduct that is the subject of the investigation]

2.3 [Explanation of why OEH considers the conduct to contravene an Act]

2.4 [Response from Individual/Company—for example: 'In response to OEH's investigation, the Company has:']

(a) [admitted] [acknowledged that it is alleged] that its conduct contravened section [insert] of the *Biodiversity Conservation Act 2016* and/or Part 5A of the LLS Act

(b) offered this Undertaking to OEH]

3. Commencement of this Undertaking

3.1 This Undertaking comes into effect when:

(a) this Undertaking is executed by [Individual/Company]

(b) this Undertaking so executed is accepted by the Environment Agency Head of OEH. (the Commencement Date).

4. Undertaking

4.1 [Individual/Company] undertakes for the purposes of section 13.27 of the BC Act that:

(a) It will:

(i) Include details of reparation or restitution offered to ameliorate any environmental or community impacts, e.g. supporting a revegetation project

(ii) reimburse OEH for agreed costs associated with investigation and monitoring of Undertaking

(iii) any contribution to legal costs

(iv) Include detail of improvements that have been made to remedy the situation in terms of training or compliance/auditing programs (relevant to companies)

(v) Include detail of improvements that have been made to minimise risk of future breaches of [INSERT: relevant sections or parts of the Act] and to ensure your 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

(vii) provide, at your own expense, a copy of any documents required by OEH.

5. Acknowledgments

5.1 [Individual/Company] acknowledges that:

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- (a) OEH will make this Undertaking publicly available including by publishing it on OEH's public register of section 13.27 undertakings on its website
- (b) OEH will, from time to time, make public reference to this Undertaking including in news media statements and in OEH's publications
- (c) this Undertaking in no way detract from the rights and remedies available to any other person arising from the alleged conduct
- (d) [a summary of OEH 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 Individual/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 Environment Agency Head of OEH pursuant to section 13.27 of the BC Act on [Date] and signed on behalf of OEH:

Delegate:

Date: