



GUIDELINES

AUSTRALIAN CONSUMER LAW ENFORCEABLE UNDERTAKINGS

ACCESS CANBERRA
ACT GOVERNMENT
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Disclaimer

These Guidelines provide general information about enforceable undertakings that may be accepted under the Australian Consumer Law adopted in the Australian Capital Territory by the *Fair Trading (Australian Consumer Law Act) 1992*. The Guidelines give some suggestions for proposing enforceable undertakings under this legislation. However, these Guidelines are not intended to represent a comprehensive statement of the law as it applies to particular problems or to individuals, or as a substitute for legal advice. Full details of legal obligations and responsibilities are set out in the Australian Consumer Law as adopted by the *Fair Trading (Australian Consumer Law) Act 1992* referred to in these Guidelines. If you refer to the legislation you should take care to ensure that you use the most up-to-date version, available from www.legislation.act.gov.au. You should seek legal advice if you need assistance with the application of the law to your situation.

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CONTENT

INTRODUCTION	5
DEFINITIONS.....	5
BACKGROUND.....	6
LEGISLATIVE BASIS	7
TIMEFRAME FOR PROPOSAL	7
DECIDING TO PROPOSE AN UNDERTAKING	8
FACTORS TO CONSIDER.....	8
DEVELOPING THE PROPOSAL	9
PERSON GIVING THE UNDERTAKING.....	9
BACKGROUND.....	9
COMMENCEMENT	10
UNDERTAKINGS.....	10
DURATION	11
ACKNOWLEDGEMENTS.....	11
SUBMITTING ENFOCEABLE UNDERTAKINGS.....	12
ACCEPTANCE OF UNDERTAKINGS.....	13
EVALUATION OF THE PROPOSAL	13
NEGOTIATIONS WITH ACCESS CANBERRA	13
VARIATION AND WITHDRAWAL	14

COMPLIANCE 15

FURTHER INFORMATION 16

INTRODUCTION

This document provides an overview of enforceable undertakings under Australian Consumer Law adopted by the *Fair Trading (Australian Consumer Law) Act 1992*.

DEFINITIONS

Meanings of particular terms used within this document:

- > **Access Canberra** – Access Canberra is the consumer protection regulator for the Australian Capital Territory.
- > **ACL** – The Australian Consumer Law, contained within Schedule 2 of the Competition and Consumer Act 2010 (Cth) and adopted in the ACT by the *Fair Trading (Australian Consumer Law) Act 1992*. The ACL aims to protect consumers and ensure fair trading in Australia.
The ACL is supported by six operational objectives:
 - to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
 - to ensure that goods and services are safe and fit for the purposes for which they were sold
 - to prevent practices that are unfair
 - to meet the needs of consumers who are most vulnerable or are at the greatest disadvantage
 - to provide accessible and timely redress where consumer detriment has occurred, and
 - to promote proportionate, risk-based enforcement.
- > **enforceable undertaking** – a written promise given by a person and accepted by the regulator in connection with a matter under the ACL that the regulator has a power or function for. Once accepted by Access Canberra, the undertaking becomes enforceable in Court .
- > **Fair Trading (Australian Consumer Law) Act 1992** – the *Fair Trading (Australian Consumer Law) Act 1992 (ACT)* which adopts the Australian Consumer Law in the ACT.
- > **term of an undertaking** – a specific promise made by the person which, if the regulator considers has been breached, allows the regulator to apply to a court for an order to enforce that promise.
- > **the person** – the duty holder who proposes an enforceable undertaking and against whom the undertaking becomes enforceable if accepted by the regulator. This includes a reference to a corporation as well as an individual.
- > **the regulator** – The Commissioner for Fair Trading - The *Fair Trading (Australian Consumer Law) Act 1992* applies the Australian Consumer Law in the Australian Capital Territory. By virtue of section 9 of that Act, the Commissioner for Fair Trading (Commissioner) is the **regulator** for the purposes of the Australian Consumer Law in the ACT.

BACKGROUND

In the event of an alleged contravention of the ACL the Commissioner may, as an alternative to commencing court proceedings in relation to the contravention, accept an enforceable undertaking given by the person who is alleged to have committed the contravention.

An enforceable undertaking is a high level sanction which is legally binding and is used where the alleged contravention is of a serious nature. Accepted enforceable undertakings will form part of the person's compliance history. An enforceable undertaking provides an opportunity for individual and organisational reform to implement better fair trading practices.

Each proposed undertaking is considered on its merit taking into account matters such as the seriousness of the alleged contravention. An enforceable undertaking should aim to deliver tangible benefits to consumers, the business, the industry and the broader community.

LEGISLATIVE BASIS

Section 218 of the ACL gives the Regulator the ability to accept written enforceable undertakings. Enforceable undertaking may be proposed where there is a breach or an alleged breach of the ACL and the undertakings seek to address that breach or alleged breach by negotiating an outcome as an alternative to court action. Enforceable undertakings are not considered where there have been very serious breaches of the ACL unless it can be demonstrated that there are exceptional circumstances.

Enforceable undertakings may be accepted as part of a settlement of court proceedings. Their terms are not restricted to orders that can be made by a court.

Although the ACL does not specify what the terms of an enforceable undertaking must be, they should directly address the conduct that has given rise to the alleged breach and its consequences, and should offer the most appropriate sanction in the circumstances of the case. Sanctions should have regard to the significance of issues concerning the industry, government and the community.

An enforceable undertaking must be entered into on a voluntary basis.

Access Canberra staff are not empowered to accept undertakings – that is the responsibility of the Commissioner.

TIMEFRAME FOR PROPOSAL

Timeframes for enforceable undertakings are not specified under the ACL. A person considering an enforceable undertaking must negotiate a timeframe for submission with Access Canberra.

Investigations and any legal proceedings will continue until such a time as any proposed enforceable undertaking is accepted. Early agreement on acceptable timeframes with Access Canberra is desirable to ensure a timely consideration of the enforceable undertaking.

DECIDING TO PROPOSE AN UNDERTAKING

There are substantial benefits to a person proposing an enforceable undertaking. An enforceable undertaking allows sanctions to be tailored to the particular circumstances of the alleged breach which allows for better outcomes for the consumer, the business, the industry and the community.

However, while an enforceable undertaking is an alternative to court action and therefore allows a person to avoid court fees, pecuniary penalties and costs of litigation, the decision to propose an enforceable undertaking should not be taken lightly. The activities associated with an enforceable undertaking are substantial and ongoing and may be of higher cost to the person than a pecuniary penalty a court may impose for the matter.

Before deciding whether to propose an enforceable undertaking, the best option is to contact Access Canberra for advice. Access Canberra will assist the person to understand what an enforceable undertaking is and the proposal process.

The person may also wish to obtain legal advice.

FACTORS TO CONSIDER

When considering whether a proposed enforceable undertaking is appropriate in the circumstances, Access Canberra will take into account factors such as:

- > the nature of the alleged breach, including:
 - the seriousness of the conduct involved; and whether the conduct resulted in substantial consumer detriment;
 - the impact of the conduct on third parties and the general community;
 - the product/service involved;
- > unconscionable conduct
- > whether the conduct detrimentally affected disadvantaged or vulnerable consumer groups;
- > the ability of an enforceable undertaking to offer redress to affected consumers;
- > the history of substantiated complaints against the person;
- > prospects for rapid resolution of the matter; and
- > the apparent good faith of the person.

DEVELOPING THE PROPOSAL

An enforceable undertaking comprises a number of sections:

- > **Person Giving Undertaking:** the name and (if applicable) ABN and ACN of the person proposing the enforceable undertaking.
- > **Background:** the facts of the conduct alleged to have given rise to the breach including an acknowledgement or admission that the conduct of concern constitutes or was likely to constitute a breach of the ACL.
- > **Commencement:** when the undertaking comes into effect.
- > **Undertakings:** the things the person agrees to either do or not do. If the person breaches these terms after an enforceable undertaking has been accepted by the regulator, they are enforceable in court.
- > **Duration:** the length of time that the undertakings will have effect.
- > **Acknowledgements:** the person acknowledges that the enforceable undertakings will be made publicly available, may be referred to in the public media and in no way derogates from the rights and remedies available to any other person alleging the conduct.

The background and undertakings inform the evaluation by Access Canberra of the suitability of the enforceable undertaking as an alternative to court proceedings. Access Canberra may verify the information that has been set out in the enforceable undertaking.

PERSON GIVING THE UNDERTAKING

This section of the enforceable undertaking must include the following information:

- > name of the person or, if a business, the name of the business;
- > if the person is a business, the ABN and ACN of that business;
- > the person's address; and
- > that the undertaking is given to the Commissioner for Fair Trading for the purpose of section 218 of the ACL.

BACKGROUND

This section of the enforceable undertaking cannot include a denial of liability, but does not require an admission of liability. It must set out the following:

- > A description of the person's business and activities;
- > The relevant facts of the matter;
- > The relevant legislation and regulations; and
- > The details of the alleged breach.

COMMENCEMENT

This section states when the undertaking will come into effect, which is typically from the time the undertaking is accepted by the regulator.

UNDERTAKINGS

This is where the person provides details of the actions they promise to do or not do, which may include:

- > A positive commitment to cease the conduct and not recommence it;
- > Specific details about the corrective action that will be taken by the person to remedy the harm caused by the conduct;
- > Details of redress where appropriate (such as payment of compensation or reimbursement to consumers) and a mechanism to determine and audit the outcome;
- > Positive reporting requirements from the person such as:
 - Progress reports on the person satisfying time-sensitive undertakings, such as a requirement to place corrective advertisements or make compensation payments;
 - When the person has satisfied all its undertaking obligations; and
 - The provision of supporting documentation to Access Canberra to verify that the obligations have been satisfied;
- > Firm future actions aimed at preventing a recurrence or any other breach of the ACL;
- > A commitment to provide a donation to a community organisation.

Examples of terms that will not be accepted by Access Canberra include:

- > Any terms imposing obligations on Access Canberra or the Commissioner;
- > A specific requirement that Access Canberra or the Commissioner will not in future institute proceedings in the particular matter;
- > A statement that the undertaking is not an admission for the purposes of third party actions (although the person does not need to explicitly state that it is such an admission);
- > Terms imposing obligations on third parties;
- > Terms purporting to set up defences for possible non-compliance; and
- > Self-serving statements by the person that seek to minimise the consequences of the conduct or for public relations or promotional purposes.

DURATION

This section should set out the length of time the undertaking will be in effect. The length of time should be reasonable given the terms of the undertaking and the impact on the community.

ACKNOWLEDGEMENTS

The person must acknowledge that:

- > Access Canberra will publish the undertaking on the Access Canberra website;
- > Access Canberra will, from time to time, make public reference to the undertaking including in news media statements and in Access Canberra publications; and
- > that the undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Examples of the kinds of terms that are likely to be accepted by the Commissioner are available on the Access Canberra website in previously accepted enforceable undertakings at www.accesscanberra.act.gov.au/.

SUBMITTING ENFORCEABLE UNDERTAKINGS

Once the person has made the decision to propose enforceable undertakings to the Commissioner and has considered the terms to be included as outlined in the **Developing the Proposal** section above, enforceable undertakings should be drafted using the template available on the Access Canberra website via www.accesscanberra.act.gov.au/.

Completed enforceable undertakings templates should be submitted to Access Canberra via:

Advice, Investigations and Enforcement
GPO Box 158
CANBERRA CITY ACT 2601.

It is recommended that the person contact Access Canberra prior to submitting an enforceable undertaking and it is highly recommended that the person seek legal advice prior to submitting an enforceable undertaking.

ACCEPTANCE OF UNDERTAKINGS

EVALUATION OF THE PROPOSAL

Once a proposal of enforceable undertakings has been submitted, the Commissioner will consider the information contained in the undertakings and, if necessary, Access Canberra staff will seek to verify the information.

The background of the matter and the terms of the proposal will be evaluated by Access Canberra to determine the suitability of an enforceable undertaking as an alternative to court proceedings for the alleged conduct.

Most undertakings accepted by the Commissioner are generally of substance and directly address the conduct that has given rise to the alleged breach and its consequences. Access Canberra evaluates proposed enforceable undertakings on a case by case basis, but will take into account factors such as:

- > the severity of the alleged breaches;
- > the size of the company;
- > the number of affected parties;
- > the connection of the proposed undertakings with the broader community;
- > the capacity of the person to comply with the undertakings;
- > the appropriateness of the terms of the undertakings, including any financial undertakings;
- > the extent to which the undertakings rectify the alleged conduct; and
- > the extent to which the undertakings will prevent future breaches.

NEGOTIATIONS WITH ACCESS CANBERRA

Accepting enforceable undertakings is rarely a straightforward process and finalising the undertakings is usually the result of negotiations between the person and Access Canberra.

The negotiation process can take some time and often depends on the size of the company, the severity of the alleged breach, the proposed undertakings and the level of involvement of solicitors.

It is important to note that the negotiation process does not affect the investigation process and Access Canberra may continue to investigate the alleged breach to determine the suitability of enforceable undertakings as an enforcement tool rather than in court proceedings.

VARIATION AND WITHDRAWAL

Under section 218(2) of the ACL, the person may, with the consent of the regulator, withdraw or vary the undertaking at any time. This allows for negotiations for changes if undertakings are found to be too difficult to comply with, impractical or circumstances change.

Access Canberra will consider any reasonable requests as long as they do not alter the spirit of the original undertaking. Variations will be made public in the same way as the original by publishing variations to an undertaking on the Access Canberra website and referring to them in public media.

COMPLIANCE

Once an undertaking has been accepted by the Commissioner, Access Canberra requires that the terms and conditions of undertakings be monitored. Access Canberra will seek to ensure that the obligations of the undertaking are being met. The mechanism of monitoring for compliance depends on the nature of the alleged breach and the nature of the terms of the undertakings.

A person will usually agree to ongoing monitoring in the terms of the undertaking such as regular auditing or checking with third parties that obligations have been fulfilled.

If Access Canberra determines that the person has not been compliant with the terms of the undertaking, then court proceedings may be commenced against that person for breach of that enforceable undertaking.

FURTHER INFORMATION

More information about ACL Enforceable Undertakings can be found on the Access Canberra website at www.accesscanberra.act.gov.au/ or by contacting Access Canberra at:

Access Canberra
13 22 81
GPO Box 158
CANBERRA CITY ACT 2601.

