

Regulatory guide No. 1

Enforceable undertakings

ISSUED AUGUST 2010, UPDATED OCTOBER 2025

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Overview

The Australian Communications and Media Authority issues regulatory guides to assist both industry and the community by:

- giving practical guidance (for example, guidance about the ACMA's approach to a particular issue or describing the steps of a process)
- describing the principles underlying the ACMA's approach in particular areas
- explaining the ACMA's view on the interpretation of the law or its application to a regulated industry
- explaining when and how the ACMA will exercise specific powers under the legislation it administers.

A regulatory guide does not constitute or replace legal advice on obligations under the relevant legislation.

1. Purpose of this guide

- 1.1 The Australian Communications and Media Authority (ACMA) has discretion to accept an enforceable undertaking (EU) under the *Broadcasting Services Act 1992*, *Spam Act 2003*, *Radiocommunications Act 1992*, *Interactive Gambling Act 2001* and the *Telecommunications Act 1997*, with respect to compliance with that Act as well as the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Do Not Call Register Act 2006*.
- 1.2 EUs can, in appropriate circumstances, provide a flexible and effective remedy. An EU may be accepted in addition to, or in substitution for, other formal enforcement action that may be available to the ACMA.
- 1.3 The purpose of this guide is to explain the ACMA's approach to accepting EUs under these Acts. While there are certain legislative differences between the various Acts, the ACMA considers that, where it is appropriate to do so, it should adopt a consistent approach to EUs.
- 1.4 This guide should be read in conjunction with the enforcement guidelines issued by the ACMA under section 215 of the Broadcasting Services Act.
- 1.5 This guide does not constitute legal advice. The undertaking party is encouraged to obtain professional advice about the consequences of entering into an EU with the ACMA.

2. What is an enforceable undertaking?

- 2.1 An EU is a negotiated binding agreement that can be enforced in court by the ACMA.
- 2.2 An EU should be regarded as a means by which the ACMA and the undertaking party may reach a settlement, as well as a means by which the undertaking party may satisfy the ACMA about its future compliance with the law.
- 2.3 EUs are a valuable enforcement and regulatory tool as they can provide, among other things:
 - a tailored and flexible resolution of the issues that are of concern to the ACMA
 - an opportunity for the undertaking party to be involved in the resolution of a matter
 - a more cost-effective and timely outcome compared to litigation.
- 2.4 Under the Broadcasting Services Act, the ACMA may also accept an EU to ensure that a person will take specified action to ensure that temporary breaches of the media diversity obligations cease within a certain time period.
- 2.5 In more complex matters, it is not uncommon for there to be a number of issues that may be of concern to the ACMA. It is open to the ACMA to accept an EU with respect to certain aspects of the matter while also pursuing other remedies.
- 2.6 Whether the ACMA will, in the exercise of its discretion, accept an EU depends on the facts of the matter. Part 3 of this guide, [Discretionary factors](#), highlights factors that the ACMA may consider in determining the appropriate enforcement response, including acceptance of an EU.
- 2.7 The acceptance of an EU in a particular set of circumstances should not be regarded as a binding precedent for future action.

3. Discretionary factors

- 3.1 In determining the appropriate enforcement response, the ACMA considers a range of factors including:
- whether the conduct was deliberate, inadvertent or reckless
 - whether the conduct has caused, or may cause, detriment to another person, and the nature, seriousness and extent of that detriment
 - whether the conduct involved indicates systemic issues that may pose ongoing compliance or enforcement issues
 - whether the person has been the subject of prior compliance or enforcement action, and the outcome of that action
 - the person's compliance history and culture
 - the personal and general educative/deterrent effect of taking action
 - the seniority and level of experience of the person/s involved in the conduct
 - what, if any, action has been taken to remedy and address the consequences of the conduct
 - whether the subject of the investigation has cooperated with the ACMA
 - whether the issues involved require urgent action/intervention by the ACMA.
- 3.2 In determining whether an EU should be accepted, the ACMA will generally also consider:
- whether the person is prepared to publicly acknowledge the ACMA's concerns about the conduct and the need for corrective action (see the discussion about publication of EUs in Part 8 of this guide, [What happens when the enforceable undertaking is accepted?](#))
 - whether the terms of the undertaking will achieve an effective outcome for those who may have been disadvantaged by the conduct (if any)
 - whether it is likely that undertakings given will be fulfilled.

4. Guiding principles

- 4.1 The ACMA may consider accepting an EU where it provides an appropriate and effective regulatory outcome.
- 4.2 The ACMA may consider accepting an EU instead of:
- seeking civil penalty orders from a court
 - taking administrative action, including taking licensing action (for example, imposing conditions on a licence, or suspending or cancelling a licence), issuing a remedial direction or giving an infringement notice.
- 4.3 While the ACMA may accept an EU in lieu of seeking injunctive relief, it is the ACMA's view that, if urgent protective action is required, injunctive relief should ordinarily be obtained. It follows that, if an EU is offered in circumstances where injunctive relief may be appropriate, the ACMA may not consider that it is appropriate to accept the EU.
- 4.4 It is the ACMA's view that conduct that may constitute a criminal offence should ordinarily not be the subject of an EU as it is appropriate for the courts to determine the appropriate sanction.

5. Terms of an enforceable undertaking

- 5.1 The ACMA will not consider accepting an EU that seeks to impose terms or conditions on the ACMA.
- 5.2 The ACMA will not consider accepting an enforceable undertaking where the person:
- seeks to deny liability
 - seeks to establish defences for a breach of the relevant Act, Code or Standard
 - merely undertakes to comply with the law.
- 5.3 The ACMA will not generally accept an EU that seeks to impose obligations on a third party.
- 5.4 As noted above, an EU should be regarded as a means by which the undertaking party and the ACMA can settle the issues of concern and it is an alternative to public enforcement action that the ACMA may take. The ACMA will therefore not accept an EU on the basis that acceptance of the EU will be confidential.¹ See also the discussion about publication in Part 8 of this guide, [What happens when the enforceable undertaking is accepted?](#)
- 5.5 The terms of an EU offered should:
- establish a relationship between the specified action and the relevant contravention
 - be proportionate to the impact of the breach or the risk of future contravention
 - be readily understood
 - be capable of implementation
 - include action that is capable of being measured or tested objectively.
- 5.6 The terms of the undertakings given will, of course, depend on the subject matter and issues involved. Examples of actions that may be appropriate include:
- the development of documented compliance procedures and systems
 - the appointment of an independent auditor to assess and report on compliance procedures and systems
 - the implementation of specific practices or procedures to reduce the risk of future contraventions (for example, use of pre-recorded rather than live-to-air programs, periodic audits)
 - the development and implementation of training programs
 - repayment of monies received/payment of compensation or damages for losses sustained by people affected by the conduct
 - refraining from engaging in specified conduct
 - expenditure or payment of an agreed sum of money that is designed to foster compliance and/or act as a disincentive to any future non-compliance
 - publishing of information, including a correction, customer information or industry-specific information
 - removal or clarification of information from a website or other publication.
- 5.7 Where the undertakings involve taking action, a time for completion of that action should be specified.

¹ Subsection 271(4) of the *Radiocommunications Act 1992* requires the ACMA to publish, on its website, an undertaking given in relation to a provision mentioned in subsection 271(1) of that Act.

- 5.8 To assist in the drafting of an EU, the ACMA has developed a template that sets out the boilerplate provisions ([Attachment A](#)). It is a guide only. As noted above, the terms of the EU must be tailored to fit the facts and circumstances of the matter.

6. Who can offer an enforceable undertaking?

- 6.1 An EU may be offered by a person, which includes individuals, corporations or licensees. Where the person is a corporation, the offer must be made by someone who has the requisite authority to negotiate and bind the company.
- 6.2 While the ACMA may discuss the possibility of an EU as potentially providing an appropriate and effective outcome, it cannot compel or require a person to offer and enter into an EU. Equally, a person cannot compel the ACMA to accept an EU. Whether an EU is accepted will depend on the facts of the case.
- 6.3 A person wishing to offer the ACMA an EU should generally raise it, in the first instance, with the ACMA officer with whom they have been dealing.

7. Who can accept an enforceable undertaking?

- 7.1 While ACMA officers may be authorised to negotiate an undertaking, the decision to accept the terms of an undertaking is usually made by the Authority or a senior officer within the ACMA.
- 7.2 Once an EU is offered, it is then a matter for the ACMA to determine whether the undertakings offered provide, in light of the facts of the case, an appropriate regulatory outcome.
- 7.3 The person offering the EU must execute the undertaking first. An EU will only come into effect when the ACMA has executed it.

8. What happens when the enforceable undertaking is accepted?

- 8.1 It is the ACMA's practice to publish all EUs on its website at www.acma.gov.au and to publicise acceptance of an EU. Certain EUs given and accepted under the Radiocommunications Act are also required to be published on the ACMA's website. See also [Regulatory Guide No 6: Publication of Enforcement Actions and Outcomes](#).

- 8.2 The ACMA will not accept an EU on a confidential basis. However, it may consider a request that it not publish particular terms of the undertaking that may disclose sensitive commercial or confidential information. It follows that, if there are particular terms of the undertaking that the undertaking party considers should not be made public, they should ensure that this is raised before the ACMA executes the EU.

9. Can an enforceable undertaking be altered after it has been accepted?

- 9.1 An EU may be varied or withdrawn but only with the ACMA's consent. If the undertaking party fails to obtain the ACMA's consent and does not comply with the undertakings given, the ACMA may take action to enforce the EU (see Part 10 of this guide, [What happens if there is a breach of an enforceable undertaking?](#)). The ACMA may also cancel an EU.

Variation

- 9.2 In the ACMA's view, a variation should ordinarily only be of a minor nature. If the variation requested is substantive, in the sense that it alters the spirit of the initial undertakings, it may be appropriate for a new EU to be entered into. Variations do not replace the original undertakings but modify them.
- 9.3 A request to vary an EU must be made in writing. The undertaking party should set out the reasons for the request and provide any supporting submissions or documentation. The request should be directed to the ACMA officer with whom the undertaking party has been dealing.

Withdrawal

- 9.4 Ordinarily, the ACMA would only agree to withdraw an EU in exceptional circumstances. Exceptional circumstances do not exist merely because the person who gave the undertaking wishes to resile from it.
- 9.5 If the EU is withdrawn, the undertaking party will no longer be bound by the terms of the EU. It would be open to the ACMA to consider taking action with respect to the conduct that was the subject of the EU.
- 9.6 A request to withdraw an EU must be made in writing. The undertaking party should set out the reasons for the request and provide any supporting submissions or documentation. The request should be directed to the ACMA officer with whom the undertaking party has been dealing.

Cancellation

- 9.7 The ACMA is empowered to cancel an EU. If the EU is cancelled, the undertaking party will no longer be bound by the terms of the EU and it would be open to the ACMA to take action with respect to the conduct that was the subject of the EU.
- 9.8 Ordinarily, the ACMA would only cancel an EU in exceptional circumstances. Exceptional circumstances may exist, for example, where the ACMA has been misled about the nature and extent of the misconduct.

Publication

- 9.9 As acceptance of the EU is made public, so too will the ACMA's decision to vary, withdraw or cancel the EU.

10. What happens if there is a breach of an enforceable undertaking?

- 10.1 If the ACMA considers that the terms of an EU have been breached, it may commence proceedings in the Federal Court. Although the ACMA may proceed directly to court, in the first instance it would generally bring any breach to the attention of the person who had given the EU.
- 10.2 If the Federal Court is satisfied that the person has breached the undertaking, it may make a number of orders, including an order directing the person:
- to comply with the undertaking
 - to pay to the Commonwealth a sum up to the amount of any financial benefit the person has obtained directly or indirectly that is reasonably attributable to the breach
 - to compensate a person who has suffered loss or damage as a result of the breach.
- 10.3 The Court may also make any other order it considers appropriate.

Attachment A

Enforceable undertaking template

This template has been provided to assist people to draft an enforceable undertaking. It is a guide only. The terms of enforceable undertakings must be tailored to fit the facts and circumstances of the matter.

ENFORCEABLE UNDERTAKING GIVEN TO THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY BY [INSERT NAME OF PERSON/ENTITY OFFERING THE UNDERTAKING; ACN/ABN/ARBN] UNDER [INSERT SECTION] OF THE [INSERT ACT]

1. Person/s giving the undertaking

This Undertaking is given to the Australian Communications and Media Authority by [insert Name, ACN/ABN/ARBN] under [insert section] of the [insert Act] (the Act).

2. Definitions

2.1 In this Undertaking:

- (a) **ACMA** means the Australian Communications and Media Authority.
- (b) [Insert other relevant definitions] ##.
- (c) ##.
- (d) **Undertaking** means this Enforceable Undertaking.

3. Term of the Undertaking

- 3.1 This Undertaking, having been executed by [Name], commences on the day it is executed by the ACMA (the commencement date).
- 3.2 This Undertaking continues for a period of [insert number of months/years] from the commencement date or until it is withdrawn or varied by [Name] with ACMA's consent under [insert section] or cancelled by the ACMA under [insert section] of the Act, whichever is earlier.

4. Background

- 4.1 [Insert description of business/activities relevant to the ACMA's investigation]
- 4.2 [Insert description of the conduct the subject of the ACMA's investigation]
- 4.3 [Insert explanation why that conduct is considered by the ACMA to contravene the relevant Act/Standard/Code]
- 4.4 [Name] acknowledges the ACMA's [view/position] that its conduct contravened [insert relevant provisions of the Act/Standard/Code].
- 4.5 In response to the ACMA's [view/position] and concerns regarding [Name's] future compliance, [Name] offers this Undertaking.

5. Undertakings

- 5.1 [Name] undertakes it will:
 - [insert undertaking/s given]
 - 5.1.1 ##
 - 5.1.2 ##

- 5.2 [Name] undertakes it will provide all documents and information requested by the ACMA from time to time for the purpose of assessing compliance with the terms of this Undertaking.

6. Acknowledgements

- 6.1 [Name] acknowledges that:

6.1.1 The ACMA will make this Undertaking publicly available [in accordance with subsection 271(4) of the *Radiocommunications Act 1992* (insert if relevant)] including by publishing it on the ACMA's website.

6.1.2 The ACMA may, from time to time, make public comment about this Undertaking and its terms which includes issuing a media release upon its execution by the ACMA.

6.1.3 The ACMA may, from time to time, publicly report on compliance with this Undertaking.

- 6.2 [Name] also acknowledges that:

6.2.1 The ACMA's acceptance of this Undertaking does not affect the ACMA's power to investigate and take compliance and enforcement action arising from conduct that is not the subject of this Undertaking or arising from future conduct.

6.2.2 This Undertaking in no way derogates from the rights and remedies available to any other person or entity arising from the alleged conduct, the subject of this Undertaking.

Execution of the Undertaking

Signed/Executed by [insert full name (insert ACN/ABN/ARBN)]:

Signature

Signature

Name (insert title if relevant/
appropriate) (print))

Name (insert title if relevant/
appropriate) (print))

Date: _____

Date: _____

Accepted by the Australian Communications and Media Authority under [insert section] of the [insert Act]:

Signature

Signature

Name, Member (print)

Name, Member/General Manager (print)

Date [leave blank, ACMA to insert]: _____