

Enforceable Undertakings Guideline

March 2023 (Version 1)

Purpose

The purpose of this guideline is to assist regulated entities and persons who are considering offering an enforceable undertaking to the Essential Services Commission. It explains:

- the commission's power to accept an enforceable undertaking
- the process for offering an enforceable undertaking to the commission
- the commission's general expectations concerning the form and acceptable terms for an enforceable undertaking
- consequences of entry into an enforceable undertaking with the commission
- consequences of breaching an enforceable undertaking.

The scope of the commission's power to accept an undertaking

Enforceable undertakings may be accepted by the commission to address a broad range of matters

Section 54ZD of the *Essential Services Commission Act 2001* (the Act) provides that the commission may accept a written undertaking given by a person (an individual or corporation) in connection with a matter in relation to which the commission has a function or power under the Act or relevant legislation.¹

Accordingly, the range of matters in respect of which the commission may accept an enforceable undertaking is very broad and includes matters that do not constitute contraventions or potential contraventions of civil penalty requirements.

¹ 'Relevant legislation' for the purposes of the *Essential Services Commission Act 2001* means legislation which is specified by that legislation as being relevant legislation (see section 3 of the Act). Relevant legislation includes the *Electricity Industry Act 2000*, the *Gas Industry Act 2001*, and Part 1A of the *Water Industry Act 1994*. The *Victorian Energy Efficiency Target Act 2007* will become relevant legislation on 1 November 2023 or earlier (subject to proclamation) pursuant to section 45 of the *Victorian Energy Efficiency Target Amendment Act 2022*.

Enforceable undertakings to address regulatory contraventions

While enforceable undertakings may apply to a broad range of matters, the commission's primary use of enforceable undertakings is as a tool to address contraventions of the Act and relevant legislation.

General circumstances in which an enforceable undertaking may be appropriate to address regulatory contraventions

The commission has a range of tools and options for responding to non-compliance or regulatory contraventions. The commission selects an appropriate response on a case-by-case basis by reference to a range of compliance and enforcement factors and seeks to meet objectives including specific and general deterrence, compensation for affected consumers, and prevention of future non-compliance.

See our [Compliance and Enforcement Policy](#) for further information about the compliance and enforcement factors that guide the commission, and commission's general approach to use of its compliance and enforcement tools.

Circumstances weighing in support of the commission accepting an enforceable undertaking may include where:

- The person or regulated entity has acted to avoid, or has remediated or repaired, any relevant harm or consumer detriment.
- The commission is satisfied that the contravention is not part of a broader pattern of non-compliance by the person or regulated entity.
- The commission is satisfied that the contravention was not the result of a poor compliance culture.
- The person or regulated entity has recognised and acknowledged to the commission that a contravention has occurred and identified and explained the root cause of the contravention.
- The person or regulated entity has co-operated with and assisted the commission in its investigation of the matter, such co-operation and assistance being substantially greater than what the law requires.

An enforceable undertaking may be accepted by the commission on its own or in conjunction with other enforcement action.

Details of undertakings must be entered on the commission's Register of Enforcement Action

Section 54ZO of the Act requires the commission to enter details of any enforceable undertaking accepted by the commission in the public Register of Enforcement Action. Details to be included in the register include:

- the name of the person who gave the undertaking
- the date the undertaking was given
- a copy of the undertaking.

Process for implementing an enforceable undertaking

An individual or regulated entity may approach the commission to offer an undertaking, or to discuss the option of offering an undertaking, to address any relevant matter. Where an undertaking is offered, it must be complete and comprehensive, noting that the commission will not engage in extensive negotiations over drafting.

In the first instance, any correspondence concerning undertakings should be submitted by email to:

- in respect of energy related matters – enforcement@esc.vic.gov.au
- in respect of matters related to the commission's functions under the *Water Industry Act 1994* – water@esc.vic.gov.au
- in respect of Victorian Energy Upgrades matters – veucompliance@esc.vic.gov.au

In some circumstances, commission staff may identify the occasion for an enforceable undertaking to address a specified matter related to a commission function or power. In these circumstances, commission staff may write to a regulated entity with a proposed enforceable undertaking for consideration. If the proposal is acceptable to the regulated entity, it can put the offer of enforceable undertaking to the commission, which will decide whether to accept the enforceable undertaking.

Form and content of an undertaking

Form of undertakings

To be capable of acceptance by the commission under section 54ZD of the Act, an enforceable undertaking must:

1. Be in writing.
2. Be in connection with a matter in relation to which the commission has a function or power under the Act or relevant legislation.
3. Be signed by the person making the undertaking. Undertakings by corporations must be executed in accordance with section 127 of the *Corporations Act 2001*. For any other entity or partnership, undertakings must be executed in accordance with applicable legislation (absent which, a CEO, Managing Director or equivalent must sign).

Terms applicable in all undertakings

Generally, the commission will only accept an enforceable undertaking under section 54ZD of the Act if:

1. It clearly identifies the person (or persons) making the undertaking.

2. The person making the undertaking explicitly acknowledges the matter giving rise to the undertaking, including (if applicable) the number of consumers affected by the matter, and any other relevant concerns communicated to the person by the commission about the matter.
3. The undertaking is specific and unambiguous concerning:
 - causes of the relevant conduct
 - any actions that the person has taken to address the matter giving rise to the undertaking
 - any further actions to be taken by the person making the undertaking in relation to the matter giving rise to the undertaking, and/or
 - any actions that the person commits to not take, or conduct in which the person commits to not engage, in relation the matter giving rise to the undertaking.
4. The undertaking states clearly when the undertaking takes effect, the timeframe in which any relevant steps or actions will be implemented, and/or the period over which the undertaking applies (generally, no less than two years).
5. The person making the undertaking commits to, upon becoming aware of any non-compliance with the undertaking, report that non-compliance to the commission within a specified period of time (e.g. five business days).
6. The person acknowledges in the undertaking that the commission will make the undertaking public on its website and may make public reference to the undertaking from time to time.

Terms generally required in undertakings concerning contraventions

In addition to the generally applicable terms set out above, where an undertaking relates to the contravention of an 'essential services requirement' (as defined in section 3 of the Act), or an offence, the commission will generally require the following matters be addressed:

Acknowledgement of breach and commitment to take specified action

1. An acknowledgment from the person or entity making the undertaking that the conduct of concern constituted a breach of an identified essential services requirement or offence provision, including the details of the circumstances of the contravention and where relevant, the number of customers affected.
2. A commitment to stop engaging in the conduct or practice that resulted in the contravention, and/or not to recommence it.

Remediation of detriment or harm

3. A clear description of any remediation actions that have, or will be taken, to remedy any detriment or harm caused by the contravention (for example, repaying consumers), and the timeframe in which any outstanding actions will be completed.
4. Details of who is or will be entitled to redress or remediation, and how any detriment or harm caused by the contravention will be assessed.

5. Contact details that persons affected by the contravention may use to access information about remediation or redress to which they may be entitled pursuant to the undertaking.
6. An acknowledgement that the undertaking in no way limits the rights and/or remedies available to any person in relation to the alleged conduct.

Compliance Improvement Action Plan

7. Clear information about the actions that the person will take to improve relevant compliance processes in an effort to prevent recurrence of any similar contravention (for example, increased compliance checks, increased training, more compliance staff, independent audit), and the timeframe for implementation (the Compliance Improvement Action Plan). In some circumstances, it may be appropriate for the person to engage an expert to provide advice as part of the Compliance Improvement Action Plan, for example, where family violence, Aboriginal and Torres Strait Islander, disability, language, or cultural issues are involved.
8. A commitment to a review, via independent audit and a written report, on the person's implementation of the Compliance Improvement Action Plan, and compliance with other relevant terms of the undertaking, by a suitably qualified compliance professional or legal practitioner approved by the commission, on a specified date.
9. A commitment to provide the commission with a copy of the written report of the independent audit on the person's implementation of the Compliance Improvement Action Plan, and compliance with other relevant terms of the undertaking.
10. A commitment that the person making the undertaking will meet all costs associated with complying with the undertaking, including costs in relation to implementation and independent audit of the Compliance Improvement Action Plan and other relevant terms of the undertaking.

Publication of the undertaking

11. A commitment to publish a copy of the undertaking on a website maintained by the person for the period of the undertaking.
12. A commitment to publish a notice summarising the purpose and key terms of the undertaking, to be approved by the commission, prominently on a website maintained by the person for the term of the undertaking or a period agreed by the commission.

Maintaining records, on-going monitoring by the Board and senior management, and progress reports to the commission

13. An acknowledgement that the person will keep records in relation to any actions, steps, or measures it is required to take under the undertaking, and will retain those records for a period of at least seven years following the conclusion of the undertaking.
14. An acknowledgement that the person will produce any records in relation to any actions, steps, or measures it is required to take under the undertaking to the commission if

requested during the term of the undertaking or within seven years following the conclusion of the undertaking.

15. Clear information about steps that will be taken to periodically monitor and report on compliance with the undertaking, including, where the person making the undertaking is a corporation, how compliance with the undertaking will be periodically reported to, and monitored by, the Board or senior management.
16. An acknowledgement that the person will provide periodic reports, at appropriate intervals, on progress made toward implementing the terms of the undertaking to the commission.
17. An acknowledgement that the person will provide a final report, at an appropriate time, on its implementation of, and/or compliance with, the terms of the undertaking to the commission.

Unacceptable terms

The commission will not generally accept an undertaking pursuant to section 54ZD of the Act where the undertaking contains terms that purport to impose obligations on the commission or third parties.

Where an undertaking relates to the contravention of a regulatory obligation, the commission will generally not accept the undertaking if it contains terms that may be construed as:

1. A denial, or a failure to acknowledge or admit that the conduct breached an essential services requirement or offence provision.
2. A limitation of the commission's enforcement options, or that the commission will not institute proceedings in relation to a particular matter in the future.
3. An assertion that harm was not caused by the relevant conduct or, or that any harm or detriment caused was not significant.
4. Statements that appear to serve public relations purposes or that are otherwise superfluous to the undertaking.

Non-compliance with an undertaking

In circumstances where the commission considers that a person who has given an undertaking has contravened a term of the undertaking, the commission may apply to the court under section 54ZE of the Act for all or any of the following orders:

- an order directing the person to comply with the relevant term of the undertaking
- an order directing the person to compensate any person who has suffered loss or damage as a result of the contravention
- an order directing the person to pay to the commission (for payment into the Essential Services Commission Enforcement Fund) an amount that represents the amount of any monetary benefits acquired by the person, or accrued or accruing to the person, as a result of the contravention of the term of the undertaking
- any other order the court considers appropriate.

In such circumstances, the commission may also opt to pursue enforcement action in relation to the primary contravention that led to the enforceable undertaking being offered and received.

Where it is necessary for the commission to seek a court order in respect of non-compliance with an undertaking, there may be costs consequences for a person who gave the undertaking.

Variation of an undertaking

A person who gives an enforceable undertaking may only withdraw or vary that undertaking with the consent of the commission.

Confidential information

Where a person offering an enforceable undertaking considers any part of the information in the enforceable undertaking to be commercially sensitive and confidential, the person should at the time of offering the undertaking:

- clearly identify the parts of the information that it considers to be confidential
- provide reasons for the identification of the information as confidential information
- provide a public version of the document with the confidential information removed or redacted for publication.

If the commission accepts that the information is commercially sensitive and confidential, the commission will not release that information except as required or allowed by law.

This guideline has been approved for publication by the commission pursuant to section 13 of the Essential Services Commission Act 2001.

The commission has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information. This guideline is for general guidance only and does not constitute legal or other professional advice and should not be relied on as a statement of law. You should obtain professional advice if you have a specific concern.

Revisions to this guideline

Version no.	Date effective	Nature of amendment
1	8 March 2023	First published

Attachment A

Sample (guide) undertaking

ENFORCEABLE UNDERTAKING

ESSENTIAL SERVICES COMMISSION ACT 2001

Undertaking to the Essential Services Commission under section 54ZD of the *Essential Services Commission Act 2001*

by

[Full Name of Company] (ACN [####])

1. Person giving this Undertaking

1.1 This Undertaking is given by [Full Name of Company and ACN] ([Company]) to the Essential Services Commission (Commission), for the purposes of section 54ZD of the Essential Services Commission Act (ESC Act).

2. Background

2.1 [Insert a description of the Company, any licences held by the Company issued by the Commission, or any relevant licence exemptions].

2.2 [Insert description of Company's business and activities in Victoria].

3. The Commission's concerns

3.1 The Commission considers that [Company] did not comply with [Identify the statutory provisions, code provisions, or licence conditions, that the Company contravened, and the dates or date-span in which the relevant contraventions occurred].

3.2 Specifically, the Commission considers that [Company] [Insert a detailed description of the Company's conduct that resulted in the relevant contravention(s). Identify what caused the contravention or why the contravention occurred. Identify when the contravention was reported to the Commission, and summarise relevant concerns communicated to the Company by the Commission about the matter].

3.3 The Commission notes that [Insert details of the number of affected consumers, and a description of any compliance or enforcement action taken against the Company for similar conduct or contraventions in any jurisdiction in the past].

4. Admissions and resolution

- 4.1 In order to resolve the Commission's concerns, [Company]:
- a) [Insert statement that the Company admits and acknowledges that it engaged in the relevant conduct and that the conduct contravened the relevant statutory or code provisions, or licence conditions];
 - b) [Insert description of any actions taken by the Company to address the matter or remediation already completed];
 - c) [If relevant, identify any response by the Company to other compliance or enforcement action that has been taken by the Commission in relation to the relevant conduct, in addition to offering this Undertaking. For example, payment of a penalty notice(s) under section 54S of the ESC Act 2001];
 - d) undertakes to:
 - i. [Set out actions that the Company will take to address the matter/s giving rise to the Undertaking].
 - ii. [If applicable, set out actions that the Company commits not to take, or conduct in which the Company will stop engaging, to address the matter giving rise to the Undertaking].
 - iii. [If applicable, set out any remediation actions that will be taken to remedy any detriment or harm caused by the contravening conduct, and the timeframe in which each action will be completed.]
 - iv. [If applicable, where a large number of consumers have been affected, set out a general description of how relevant consumers will be identified, what remediation or compensation will be provided, and how entitlement to remediation or compensation will generally be calculated or assessed].
 - v. [If applicable, provide contact details that consumers or persons affected by the contravention may use to access information about remediation or redress to which they may be entitled under the Undertaking]; and
 - e) [Insert statement that [Company] will, on and from the Commencement Date, and at its own expense:
 - i. implement a Compliance Improvement Action Plan (the Action Plan) in accordance with the requirements set out in Annexure A
 - ii. maintain the Action Plan for a period of [xx months/years] from the Commencement Date
 - iii. provide copies of any documents described in Annexure A when requested by the Commission].

5. Commencement and Term of Undertaking

- 5.1 This Undertaking comes into effect on the Commencement Date, being the date when:
- a) the Undertaking is executed by [Company]
 - b) the Undertaking so executed is accepted by the Commission, and
 - c) the [Company] is given notice of the Commission's acceptance of the Undertaking.
- 5.2 The Undertaking remains in effect for [xx months/years] from the Commencement Date.

6. Compliance with Undertaking

- 6.1 In the event that [Company] has reason to believe that it has not complied with a requirement of this Undertaking, it will report that possible non-compliance to the Commission within five business days.
- 6.2 [Company] will provide further information or particulars to the Commission concerning any possible non-compliance reported to the Commission within a reasonable time upon request by the Commission.

7. Maintaining Records and Monitoring of Undertaking

- 7.1 [Company] commits to maintaining records confirming any actions, steps, or measures it takes pursuant to meeting the terms of this Undertaking, and retaining those records for a period of at least seven years following the conclusion of the Undertaking.
- 7.2 [Company] will produce any records in relation to any actions, steps, or measures it is required to take under this Undertaking to the commission if requested during the term of the undertaking or within seven years following the conclusion of the Undertaking.
- 7.3 [Set out steps that [Company] will take to periodically monitor and report on compliance with the Undertaking, including, how compliance with the undertaking will be periodically reported to, and monitored by, the Board or senior management of [Company]].
- 7.4 Following commencement of the Undertaking, at [six month] intervals, [Company] will make a report to the Commission on progress made toward implementing the terms of the Undertaking.
- 7.5 Within one month of the conclusion of the term of the Undertaking, [Company] will provide a final report to the Commission on its implementation of, and/or compliance with, the terms of the undertaking.

8. Acknowledgements and Publication of Undertaking

8.1 [Company] acknowledges that:

- a) the Commission will make this Undertaking publicly available by publishing it on its website and in its online Register of Enforcement Action
- b) the Commission may from time to time, make public reference to this Undertaking including in news media statements and in Commission publications;
- c) this Undertaking in no way limits or affects any rights or remedies available to any other person arising from the conduct; and
- d) The Commission may publish a summary of the independent auditor's reports on the Company's implementation of the Compliance Improvement Action Plan (referred to in Annexure A of this Undertaking) on its website and in its online Register of Enforcement Action.

8.2 [Company] commits to publishing a copy of the Undertaking on a website maintained by [the Company] for the period of the Undertaking.

8.3 [Company] commits to publishing a notice summarising the purpose and key terms of the undertaking, to be approved by the Commission, prominently on a website maintained by [the Company] for the term of the Undertaking or a period agreed by the Commission.

8.4 [Company] acknowledges it must pay all its own costs in relation to this Undertaking including costs associated with remediation or compensation associated with the Undertaking, and costs related to implementation of the Compliance Improvement Action Plan.

Executed as an Undertaking

Executed for and on behalf of [Full Company Name ACN ###] in accordance with section 127 of the *Corporations Act 2001*:

Signature of director

Signature of director/company secretary (delete as appropriate, or entire column if sole director company)

Name of director

Name of director/company secretary

Date

Date

Accepted by the Essential Services Commission pursuant to section 54ZD of the *Essential Services Commission Act 2001* and signed on behalf of the Commission:

Name, Chairperson

Date

ANNEXURE A: Compliance Improvement Action Plan

[Company] undertakes to implement the Compliance Improvement Action Plan by undertaking the actions set out in this Annexure.

1. [Set out clear information about the actions the company will take to improve relevant compliance processes to prevent recurrence of any similar contravention and to otherwise address matters giving rise to the Undertaking. Where applicable, describe specific measures, and timeframes for their implementation, under the following sub-headings:
 - i. training
 - ii. quality assurance and compliance monitoring
 - iii. compliance staff and resourcing
 - iv. reporting to the Board and Senior Management
 - v. independent review of compliance with Compliance Improvement Action Plan [Set out a commitment to commission an independent audit and written report on the Company's implementation of the Compliance Improvement Action Plan, and compliance with other relevant terms of the Undertaking, by a suitably qualified compliance professional or legal practitioner to be approved by the Commission]
 - vi. provision of Compliance Improvement Action Plan documents to the Commission [Set out a commitment to, by a specified date, provide the Commission with a copy of the report of the independent auditor on the Company's implementation of the Compliance Improvement Action Plan, and compliance with other relevant terms of the Undertaking].