

Enforceable Undertakings

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1. Purpose

The purpose of this guideline is to provide stakeholders with information about how NOPSEMA and the OIR administer the Enforceable Undertaking provisions of the relevant legislation.

2. Scope

The guideline addresses the eligibility, application, assessment and completion of Enforceable Undertakings as they are applicable to NOPSEMA and the OIR.

3. Overview of Enforceable Undertakings

Generally, an Enforceable Undertaking is a written commitment by a person to take specific action (or refrain from action) in order to prevent, or respond to, non-compliance with a provision of legislation.

An Enforceable Undertaking is legally binding and may be given as a result of a compliance activity, an investigation, or as an alternative to the agency commencing criminal or civil penalty proceedings. An Enforceable Undertaking may be accepted by the CEO relating to a contravention, or alleged contravention with a relevant provision of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act), *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2024* (Safety Regulations) or the *Offshore Electricity Infrastructure Act 2021* (OEI Act).

The use of an Enforceable Undertaking can assist in improved compliance outcomes. Enforceable Undertakings provide an enforcement option in addition to, for example, notices, directions, infringement notices, civil penalty proceedings and criminal prosecutions as per the respective agencies' Enforcement Policies.

4. Relevant Legislation

Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (RPA) creates the framework for Enforceable Undertakings, including what types of Enforceable Undertakings are acceptable and how they can be enforced by a relevant court.

Specific legislation relevant to the use of Enforceable Undertakings by NOPSEMA are:

- Chapter 6, Part 6.5, Division 8 of the OPGGS Act.

This division provides a list of provisions an Enforceable Undertaking can apply to, a requirement to publish an accepted Enforceable Undertaking on the NOPSEMA website and outlines the circumstances where an Enforceable Undertaking in relation to an OHS offence cannot be accepted.

- Chapter 5, Part 4, of the Safety Regulations.

This part mirrors the relevant division of the OPGGS Act and provides a further list of provisions under the Safety Regulations which an Enforceable Undertaking can apply to.

Specific legislation relevant to the use of Enforceable Undertakings by the OIR are:

- Chapter 5, Part 4, Division 8 of The OEI Act.

This division provides a list of provisions an Enforceable Undertaking can apply to, a requirement to publish an accepted Enforceable Undertaking on the OIR website and outlines the circumstances where an Enforceable Undertaking in relation to an WHS offence cannot be accepted. It also draws in certain provisions from the *Work Health and Safety Act 2011 (Cth)*.

5. Approach to Enforceable Undertakings

In accordance with their respective Enforcement Policies, NOPSEMA and the OIR must take a responsive and proportionate approach to compliance and enforcement activities, applying the strongest actions to the most serious breaches, and escalating actions where initial responses do not achieve intended outcomes. The agency's use of Enforceable Undertakings forms part of its consideration of the most appropriate means to address contraventions (or alleged contraventions) of the relevant legislation.

The CEO may consider accepting an Enforceable Undertaking instead of using other compliance or enforcement tools. The CEO will only accept an Enforceable Undertaking if they believe this is the most effective and appropriate regulatory mechanism given the significance of the (alleged) contravention, the nature and seriousness of the (alleged) contravention and the compliance history of the person.

The CEO will also consider whether the Enforceable Undertaking would provide a more appropriate regulatory outcome than non-negotiated, administrative, civil or criminal sanctions. The CEO will not consider an Enforceable Undertaking unless they believe there has been a contravention, or alleged contravention, of the relevant legislation.

The CEO will determine whether to accept or enforce an Enforceable Undertaking on a case-by-case basis.

Note that until an Enforceable Undertaking has been accepted, any investigation or proceedings in relation to any relevant matter will continue unaffected.

6. Factors considered regarding the use of Enforceable Undertakings

The suitability of an Enforceable Undertaking in connection with a contravention involves consideration of a range of factors which could include (where relevant):

- the nature and extent of the relevant (alleged) contravention
- the level of deterrent required
- the quality of the remedial action proposed and the extent to which it achieves measurable improvements to the safety of the offshore workforce or environment

- the likelihood that the Enforceable Undertaking will deliver real benefits to the safety of the offshore workforce or the environment, beyond that which would normally be expected of a person
- the degree to which the person has demonstrated a commitment to working collaboratively with the agency, both generally and in relation to the specific alleged contravention
- what actions have already been taken by the person to remedy the alleged contravention
- the capacity of the person to meet the Enforceable Undertaking and whether an Enforceable Undertaking is likely to be complied with
- the degree of harm to persons or the environment
- the extent (if any) of the individual's past non-compliance or documented complaints related to the matter
- whether there are any other compliance tools available that are more appropriate in the circumstances.

6.1. When an Enforceable Undertaking is not an appropriate enforcement tool

Without limiting the discretion of the CEO, an Enforceable Undertaking will generally not be accepted in circumstances where the alleged contravention:

- resulted in death; or
- involves deliberate misconduct, or conduct involving a degree of recklessness.

Further, an Enforceable Undertaking will generally not be accepted if the person has been convicted of an OHS offence¹ or WHS offence² by the relevant agency:

- in the last 5 years for a contravention that contributed to a death
- in the last 10 years for two or more OHS or WHS offences, where at least two of those convictions arose from separate investigations.

The CEO may consider an Enforceable Undertaking, in the above circumstances, where the CEO in their full discretion believes exceptional circumstances exist.

7. How an Enforceable Undertaking is progressed

7.1. Initiation of an Enforceable Undertaking

A person who believes they have, or may have, contravened the relevant legislation can offer to provide an Enforceable Undertaking to the agency at any time. This includes in circumstances where they may already

¹ As defined by s611N(6) and s638 of the OPGGS Act

² As defined by s218(6) and s221 of the OEI Act

be the subject of other regulatory action by the agency - for instance, civil penalty proceedings - or even where a matter is still under investigation.

The CEO does not have the power to demand or compel a person to enter into an Enforceable Undertaking. In appropriate circumstances, the agency may raise this as an option in the context of the relevant Enforcement Policy and let the person consider whether they want to make such an offer in lieu of the agency taking other compliance or enforcement action(s) in relation to that matter.

7.2. How to propose an Enforceable Undertaking

Before proposing an Enforceable Undertaking, it is recommended that a person consider these guidelines and consult with NOPSEMA or the OIR. A copy of the template and guidance will be provided on request. Consultation regarding a proposed Enforceable Undertaking is generally conducted on a 'without prejudice' and non-binding basis.

A written Enforceable Undertaking should then be submitted to the agency using the template, with consideration to the terms listed in Appendix A: Terms of an Enforceable Undertaking.

7.3. Consideration of Enforceable Undertakings

Once a written Enforceable Undertaking has been received by the agency, it will be assessed against the legislative requirements and a range of factors including those outlined in section 6. This may involve some negotiation of terms and the engagement of independent expert advice.

7.4. Acceptance and commencement of Enforceable Undertakings

The CEO may accept the Enforceable Undertaking committing a person to particular action (or inaction) in order to prevent, or respond to, a contravention or alleged contravention of a provision of the relevant legislation.

For example, the CEO may accept any of the following written Enforceable Undertakings given by a person that a person will:

- in order to comply with a provision, take specified action
- in order to comply with a provision, refrain from taking specified action; or
- take specified action directed towards ensuring that the person does not contravene a provision of the legislation, or is unlikely to contravene a provision, in the future.

Once an Enforceable Undertaking has been accepted, the person will be notified in writing, and the agency will suspend all other ongoing investigation and enforcement actions in relation to the specific contravention.

In circumstances where the CEO intends to reject the proposed Enforceable Undertaking, a letter will be provided to the person providing reasons for this decision.

7.5. Publication of Enforceable Undertakings

The agency is required to publish the Enforceable Undertaking on its website.

7.6. Withdrawal or variation of an Enforceable Undertaking

The person giving an Enforceable Undertaking may vary or withdraw an Enforceable Undertaking at any time, provided the CEO gives written consent to the variation or withdrawal.

This enables negotiation between the agency and the person who gave an Enforceable Undertaking where, for example:

- circumstances have changed such that the original terms of the Enforceable Undertaking have become impracticable or may no longer be relevant; or
- where it would be appropriate to address issues that were not foreseen at the time the Enforceable Undertaking was first accepted.

However, any proposed variation which alters the spirit of the original Enforceable Undertaking will not be accepted.

The agency applies the same criteria to considering requests for variation of an Enforceable Undertaking as to considering accepting an Enforceable Undertaking.

The CEO may cancel the Enforceable Undertaking by giving written notice given to the person.

7.7. Monitoring and completion of Enforceable Undertakings

Compliance with the Enforceable Undertaking must be monitored and reported as per the specific terms agreed upon with the agency. In order to facilitate this, it may be appropriate that an independent third party approved by the agency is engaged by (and at the cost of) the person in order to monitor compliance and report to the agency, as part of the agreement.

Once the person has met all conditions of the Enforceable Undertaking to the satisfaction of the CEO, the Enforceable Undertaking will be considered complete and written confirmation of this will be provided to the person by the agency.

7.8. Breaches of Enforceable Undertakings

Where an Enforceable Undertaking is not complied with, the agency may seek orders from the Court.

The CEO may apply to a relevant court to have an Enforceable Undertaking enforced if:

- a person has given an Enforceable Undertaking
- the Enforceable Undertaking has not been withdrawn or cancelled; and
- the agency considers that the person has breached the Enforceable Undertaking.

If the relevant court is satisfied that the person has breached the Enforceable Undertaking, the court may make any or all the following orders:

- an order directing the person to comply with the Enforceable Undertaking
- an order directing the person to pay 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

- any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the court considers appropriate.

8. Related documents

N-05000-PL0067 – NOPSEMA Enforcement Policy

N-05501-PL2096 – OIR Enforcement Policy

Appendix A: Terms of an Enforceable Undertaking

In order to be enforceable, the Enforceable Undertaking must not only meet the requirements of the RPA and the OPGGS/OEI Acts and Regulations, it must also be sufficiently specific for the person making the Enforceable Undertaking to know exactly what is expected of them, to ensure any failure to comply is readily apparent.

The terms of an Enforceable Undertaking should include:

- a notation that the proposal is being provided on a without prejudice basis
- an acknowledgement by the person that a contravention of the relevant legislation has occurred, or has otherwise been alleged by NOPSEMA or the OIR
- a list of agreed facts in relation to the contravention
- specifics around what will be done or not done by the person to return to compliance or to ensure that the person will not contravene in the future
- time period(s) within which actions will be taken or refrained from taking
- a commitment by the person to future compliance measures (for example, regular reporting to the agency, training for personnel, or regular internal audits)
- a detailed description of how the compliance with the Enforceable Undertakings will be monitored, by what party and at whose cost
- an acknowledgement that the Enforceable Undertaking will, in whole, be published on the agency's website.

The following terms will not normally be acceptable to the CEO for inclusion in an Enforceable Undertaking:

- denials that any relevant conduct contravened, or was likely to have contravened, the relevant legislation
- any terms purporting to impose conditions on the agency
- terms purporting to set up defences for possible non-compliance
- any statement that purports to impose conditions on third parties; or
- any statement that seeks to minimise the possible consequences faced by the person as a result of the conduct for public relations or promotional purposes.

Standard terms are available in the agency's template for Enforceable Undertakings.