



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 100

Enforceable undertakings

March 2007

Note: Cross-references in this guide were updated in February 2008 to reflect ASIC's current regulatory document framework.

What this guide is about

- 1 This guide explains our approach to accepting undertakings under s93A and 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Undertakings accepted by us under these provisions are enforceable by the courts.
- 2 Enforceable undertakings are one of our most flexible and effective remedies to improve and enforce compliance with the law. This guide explains:
 - (a) what an enforceable undertaking is;
 - (b) when we will consider accepting an enforceable undertaking;
 - (c) what terms are or are not acceptable to us (although each case will be considered on its particular facts); and
 - (d) what happens if an enforceable undertaking is not complied with.
- 3 We will not consider accepting an enforceable undertaking for trivial matters. We may consider accepting an enforceable undertaking in more serious cases where this remedy can achieve a more effective regulatory outcome than civil or other administrative action.
- 4 This guide should be read with other regulatory guides we have published on how we administer the *Corporations Act 2001* (Corporations Act) and the ASIC Act: see 'Related papers' in this guide. This guide replaces Practice Note 69 *Enforceable undertakings* (PN 69).

Important note: This publication is issued as a general guide to how we apply our powers to accept enforceable undertakings. It is your responsibility to determine your legal obligations. Examples provided in this guide are purely for illustrative purposes; they are not exhaustive and are not intended to impose or imply particular rules or requirements. **This guide does not constitute legal advice.** We encourage you to seek your own professional advice to find out how the Corporations Act, the ASIC Act and other relevant legislation applies to you.

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Section 1: What is an enforceable undertaking?

Our role and responsibilities

1.1 Enforceable undertakings are one of a number of remedies available to ASIC for breaches of the legislation ASIC is responsible for enforcing. It is an administrative settlement we may accept as an alternative to court action or certain other administrative actions.

Note: In general terms, ASIC's functions and powers are conferred on it by the Corporations Act, the ASIC Act, and the following related acts (through s12 of the ASIC Act):

- (a) *Insurance Contracts Act 1984*;
- (b) *Superannuation (Resolution of Complaints) Act 1993*;
- (c) *Life Insurance Act 1995*;
- (d) *Retirement Savings Accounts Act 1997*; and
- (e) *Superannuation Industry (Supervision) Act 1993*.

Note: For guidance on our use of administrative remedies in enforcing the financial services provisions of the Corporations Act, see Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98) .

1.2 Under the ASIC Act, we may accept a written enforceable undertaking:

- (a) given by a person on a matter over which ASIC has a function or power under the ASIC Act (s93AA); or
- (b) given by a responsible entity of a registered scheme on a matter involving the registered scheme, and over which ASIC has a function or power under the related legislation (s93A).

1.3 Our power to accept enforceable undertakings enhances our ability to enforce compliance with the law. We see enforceable undertakings as an important component in our array of enforcement remedies to influence behaviour and encourage a culture of compliance for the benefit of all participants in the market we regulate.

1.4 We consider that an enforceable undertaking can sometimes offer a more effective regulatory outcome than could otherwise be achieved through other available enforcement remedies, namely civil or administrative action. We will not enter into an enforceable undertaking that does not offer a more effective regulatory outcome.

Note: For discussion about what constitutes an effective regulatory outcome, see paragraph 2.8 of this guide.

How an enforceable undertaking works

1.5 An enforceable undertaking can be initiated by a company, an individual or a responsible entity, or as a result of a discussion between that party and ASIC. We do not have the power under s93A and 93AA to require a person to enter into an enforceable undertaking. Similarly, a person cannot compel us to accept an enforceable undertaking.

1.6 An enforceable undertaking is different to an undertaking to a court. Table 1 shows the main differences between an undertaking to ASIC and an undertaking to a court.

Table 1: Differences between undertakings given to ASIC and to a court

Feature	Undertaking to ASIC	Undertaking to a court
<i>When the undertaking can be accepted</i>	ASIC does not have to start a court action before it can accept an undertaking under the ASIC Act (s93A or 93AA).	An undertaking may only be given when a court action has started.
<i>What happens in the event of non-compliance</i>	ASIC may apply to the court for appropriate orders if the undertaking is not complied with.	A breach of the undertaking may itself be the subject of contempt proceedings (i.e. it may be enforced in the same way as an injunction).

What happens when an enforceable undertaking is offered

1.7 A person wishing to offer us an enforceable undertaking under s93A or 93AA (promisor) should first discuss it with an ASIC case officer assigned to the investigation.

1.8 Once the offer has been made and the terms of any undertakings discussed, the decision to accept or reject the offer is a formal decision made by a senior executive.

1.9 In the course of drafting the undertaking, we will negotiate the terms of the undertaking with the promisor in order to arrive at an appropriate regulatory outcome.

1.10 Our acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a binding precedent for future action. For instance, the fact that we have accepted an undertaking for misconduct from one person does not necessarily mean we will accept an undertaking for the same misconduct from another person, or that we will accept a further enforceable undertaking from the same person. Whether we accept an undertaking will depend on the factors listed at paragraph 2.8.

1.11 An enforceable undertaking will not take effect until it is formally accepted by one of our senior delegates with authority to accept the enforceable undertaking. Both ASIC and the promisor keep a signed original of the enforceable undertaking.

1.12 We will then make the undertaking available for public inspection on our enforceable undertakings register: see paragraph 3.9 of this guide.

Section 2: When will we consider accepting an enforceable undertaking?

Our general approach

2.1 We may accept an enforceable undertaking instead of:

- (a) seeking a civil order from a court (e.g. an award of damages or compensation, or an injunction); or
- (b) taking administrative action (e.g. cancelling a licence); or
- (c) referring a matter to another administrative body.

This means that we will not consider an enforceable undertaking unless we have reason to believe there has been a contravention of relevant legislation and have commenced an investigation into the conduct we believe gives rise to the suspected breach. We will not contemplate an undertaking to forestall an investigation.

2.2 We will use an enforceable negotiated settlement only if we consider it provides a more effective regulatory outcome than non-negotiated, administrative or civil sanctions.

Note: For discussion about what constitutes an effective regulatory outcome, see paragraph 2.8 of this guide.

2.3 A negotiated settlement has a number of potential advantages. It can, for example:

- (a) produce a swift result that compensates persons who have suffered loss or damage as a result of the contravention or alleged contravention of the law;
- (b) compel the individual, company or responsible entity to implement improved compliance arrangements, monitored by an independent expert reporting to ASIC;

Note: Examples of improved compliance arrangements include improvements to corporate governance arrangements, disclosure practices, staff training, implementing a whistleblower regime and regular reports to ASIC on progress in implementing a new compliance program.

- (c) restrict the activities that may be undertaken by an individual, company or responsible entity; and
- (d) be a cost-effective alternative to litigation.

2.4 We will generally only consider accepting an enforceable undertaking in the following circumstances:

- (a) we have considered starting civil or administrative enforcement action for a contravention or an alleged contravention of the relevant legislation;
- (b) we have weighed up the nature of the alleged breach and the effectiveness of the regulatory outcome offered by the enforceable undertaking compared to outcomes offered by other available enforcement remedies; and
- (c) we believe an enforceable undertaking is the most effective and appropriate regulatory outcome given the significance of the issues to the market and the community, the nature and seriousness of the alleged breach and the compliance history of the party (see paragraphs 2.8–2.12 of this guide).

When we will not accept an enforceable undertaking

2.5 We will not accept an enforceable undertaking:

- (a) instead of commencing criminal proceedings against a party; or
- (b) to secure payment of a pecuniary civil penalty (see paragraph 2.6 of this guide); or
- (c) after a matter has been referred to a specialist body (see paragraph 2.13 of this guide); or
- (d) in respect of deliberate misconduct or fraud; or
- (e) for trivial matters; or
- (f) as an alternative form of relief if conditional relief has not been complied with.

2.6 Where a pecuniary civil penalty is involved, we believe that the public interest is best served by a court determining whether a pecuniary penalty is available and, if so, its quantum.

2.7 However, we recognise that enforceable undertakings can play an invaluable role in accelerating the payment of compensation to affected third parties. In such cases, an enforceable undertaking may be a valid alternative to a compensation order, depending on the circumstances: see Table 3.

What is an effective regulatory outcome?

2.8 When we assess whether an enforceable undertaking is a more effective regulatory outcome than other possible courses of action, we take into account four critical considerations:

- (a) the position of consumers and investors whose interests have been or may be harmed by the suspected conduct;
- (b) the effect on the regulated person's future conduct;
- (c) the effect on the regulated population as a whole; and
- (d) the community benefit in regulatory outcomes being achieved as quickly and cost-effectively as possible.

2.9 We would consider an enforceable undertaking to be an effective regulatory outcome if it:

- (a) promotes the integrity of, and public confidence in, our financial markets and corporate governance;
- (b) specifically deters the person from future instances of the conduct which gave rise to the undertaking;
- (c) promotes general deterrence in making the business community aware of the conduct and the consequences arising from engaging in that conduct; or
- (d) provides an ongoing benefit by way of improved compliance programs.

When is an enforceable undertaking an appropriate remedy?

2.10 When deciding whether an enforceable undertaking is appropriate in the circumstances of the case, we will consider the following factors (this list is not exhaustive):

- (a) Is the person prepared to publicly acknowledge ASIC's concerns about the conduct and the necessity for protective or corrective action?
- (b) Was the misconduct that ASIC considers to be a breach inadvertent?
- (c) Was the conduct that ASIC considers to be a breach a result of the conduct of one or more individual officers or employees of the company?
- (d) What was the seniority and level of experience of the individual(s) involved in the breach?
- (e) Has the person co-operated with ASIC, including providing us with complete information about the underlying breaches and any remedial efforts?

- (f) Will it achieve an effective outcome for those who have been adversely affected by the conduct or compliance failure?
- (g) Is the person likely to comply with the enforceable undertaking?
- (h) Has the person been the subject of complaints or previous ASIC enforcement action?
- (i) What are the prospects for a speedy resolution of the matter?

2.11 Paragraph (f) may be relevant where several remedial actions (including adversarial and negotiated remedies) could rectify the consequences of the misconduct. We will weigh the available alternatives in deciding the most effective approach. In some circumstances, an enforceable undertaking may provide the most effective and flexible resolution as a range of outcomes can be achieved with a single remedy.

2.12 In appropriate cases, we may accept an enforceable undertaking if it would completely settle an existing or potential civil or administrative enforcement action.

What if administrative proceedings have already started?

2.13 We consider an enforceable undertaking to be inappropriate after a matter has been referred to a specialist body for determination or resolution. If we have referred a matter to one of the bodies in Table 2, we have concluded that this will achieve the most effective regulatory outcome in the circumstances.

Table 2: Specialist bodies we may refer matters to

<i>Companies Auditors and Liquidators Disciplinary Board (CALDB)</i>	The CALDB is empowered to determine, upon application by ASIC, whether a registered auditor or liquidator has contravened provisions of the Corporations Act. The CALDB may then make orders cancelling or suspending their registration, or admonish or reprimand them.
<i>Financial Reporting Panel</i>	The Financial Reporting Panel is empowered to resolve disputes between ASIC and companies in relation to the application of accounting standards in their lodged financial reports.
<i>Takeovers Panel</i>	The Takeovers Panel has wide powers. Its primary power is to conduct a hearing, upon application by ASIC, a bidder or target, or any other person whose interests are affected, to determine whether to make a declaration of 'unacceptable circumstances' about the affairs of a company. Note: The Takeovers Panel may also accept undertakings enforceable by a court under s201A of the ASIC Act.

What if a matter has already been referred to an ASIC delegate and a disqualification order is an available remedy?

2.14 We will generally not accept an enforceable undertaking after a matter has been referred to an ASIC delegate for possible disqualification or suspension.

At this stage, ASIC will have considered the matter in some detail and, should a delegate decide to make an administrative order, ASIC views this as a more effective regulatory outcome than an enforceable undertaking, as:

- (a) such a decision would clearly reflect our view of the nature and extent of the misconduct by making findings of fact;
- (b) breach of a disqualification order under Part 2D.6 or s920C is a criminal offence (this is not the case with a breach of an enforceable undertaking); and

Note: This approach is consistent with *Sage v Australian Securities and Investments Commission* [2005] FCA 1043 where an undertaking offered to the court as an alternative to banning action was not considered to be an adequate alternative.

- (c) any persons disqualified by a delegate will be listed on one of the public registers of banned or disqualified persons.

Examples of undertakings which we may accept

2.15 The examples in Table 3 illustrate in general terms the kinds of undertakings we may accept. The undertakings are not mutually exclusive and an enforceable undertaking may encompass more than one such undertaking.

2.16 These examples are indicative only and are not exhaustive. Every enforceable undertaking is tailored to the particular circumstances of a matter and will contain specific undertakings clearly setting out the promisor's obligations. We will not accept an enforceable undertaking in cases of deliberate misconduct or fraud.

Table 3: Examples of enforceable undertakings

<i>Corporate governance</i>	<p>Refrain from taking part in the management of specified corporations for a set period of time.</p> <p>Remedy the deficiencies in the company's compliance systems by taking certain specified action, and having this reviewed by an independent auditor or expert.</p>
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<i>Auditors and liquidators</i>	<p>Refrain from performing a significant role in an audit engagement for a set period of time, completing additional professional education, and be subject to technical supervision on future audit engagements for a set period of time.</p> <p>Refrain from accepting appointments to insolvency administration for a set period of time, complete additional professional education, and be subject to technical supervision on future insolvency administration.</p>
<i>Disclosure</i>	<p>Inform the market to correct some previous false or misleading disclosure or any continuing misapprehension for which it is responsible.</p> <p>Set up and implement an internal compliance plan and report periodically to the market.</p>
<i>Takeovers</i>	<p>Remedy the unacceptable circumstances which have occurred, or may have occurred, in a takeover by carrying out certain necessary action (provided that the matter has not been referred to the Takeovers Panel).</p>
<i>Rectification or compensatory action</i>	<p>Pay damages to identified third parties, with a process for bringing this about described in the undertaking.</p> <p>Perform a community service obligation (e.g. by funding an education program for consumers of particular financial services, or disgorge profits from unlawful conduct by paying money to relevant consumers, a charity or community organisation).</p>
<i>Corrective notices</i>	<p>Write to investors or parties affected by the misconduct, advising them of the fact of the enforceable undertaking, its terms and how a copy of it can be obtained.</p> <p>Issue an advertisement or engage in corrective advertising (on a website or otherwise) to rectify any misleading conduct.</p>

Section 3: What are the terms of an enforceable undertaking?

Acceptable and standard terms

3.1 We will only accept an enforceable undertaking if the promisor makes a commitment to:

- (a) stop the particular conduct or alleged breach that concerns us; and
- (b) not recommence that conduct.

3.2 ASIC will from time to time publish example templates which will be available from our website.

Note: We will from time to time update and add to these templates. We also anticipate that further templates may be added in the future. Note that the templates are offered as examples only and the terms of any undertaking should be tailored to the individual circumstances of the case.

Table 4: What an enforceable undertaking covers

<i>Background</i>	This section sets out detail of the relevant conduct and the nature of our concerns about the conduct.
<i>Compliance and monitoring</i>	<p>An enforceable undertaking must specify how the promisor will address the conduct we are concerned about and ensure it does not occur again. We must also be satisfied that the promisor has adequate arrangements for monitoring how the undertaking is implemented and reporting to ASIC.</p> <p>Details might include:</p> <ul style="list-style-type: none"> • monitoring and reporting mechanisms the promisor will adopt (e.g. internal control/compliance programs); • any external assessment of the changes that are put in place; • the name of the contact officer who is responsible for monitoring compliance with the undertaking (and any external expert); and • the ASIC officer they will report to about compliance with the undertaking.
<i>Rectification or compensatory action</i>	In resolving any matter, we aim to find ways to rectify the harm caused by the alleged breach. This may involve the promisor compensating, reimbursing or giving other appropriate forms of redress to parties adversely affected by its conduct.
<i>Corrective notices</i>	In cases of misleading conduct, we will require the promisor to unequivocally correct the misleading impression for which it is responsible.

<i>Other action</i>	The promisor must acknowledge that the undertaking does not affect the rights of other parties or constitute any restraint on ASIC, except for specific civil or administrative action that ASIC has agreed to compromise. We may accept an enforceable undertaking while continuing with our investigation into specific matters outside the enforceable undertaking.
<i>Publicity and public access</i>	All enforceable undertakings must contain a waiver of confidentiality clause (excluding certain information where necessary: see paragraph 3.7 of this guide). The promisor must also acknowledge in the undertaking that it accepts ASIC's publicity and public access policy.

Unacceptable terms

3.3 Generally, we will not accept an undertaking that:

- (a) contains a clause denying liability or omitting any standard clauses (unless otherwise specifically excluded by ASIC);
- (b) does not include details of the misconduct which gave rise to the enforceable undertaking and to our concerns about that conduct; and
- (c) contains any clause that sets up defences for possible non-compliance with the enforceable undertaking.

Publicity and public access to undertakings

3.4 If we take enforcement action, our approach to public comment on that action is contained in Regulatory Guide 47 *Public comment* (RG 47). As a general principle, we believe there is significant public interest in ensuring that consumers, industry and the broader community are aware of and informed about enforcement action we take. Transparency and disclosure are important factors in market integrity and consumer confidence; they serve to promote deterrence and educate consumers and industry.

3.5 Given that the usual alternative to offering an enforceable undertaking involves potential publication of an adverse finding by a court, a Panel or the CALDB, we regard it as appropriate that the subject and terms of an enforceable undertaking be made public. It is therefore our practice to issue a media release in a form determined by us when we accept an enforceable undertaking.

Public access

3.6 We will not accept enforceable undertakings in confidence. We will not enter into an enforceable undertaking on the basis that the terms of the undertaking or parties will be confidential.

3.7 We will make the whole undertaking available for public inspection unless the promisor asks for certain information not to be released and we are satisfied that:

- (a) the information is commercial in confidence;
- (b) the information consists of personal details of an individual;
or
- (c) the information should not be disclosed because its release would be against the public interest.

3.8 If information is deleted, the copy of the undertaking made available under s93A(6) will include a note stating that certain information has been deleted. While there is no equivalent obligation in s93AA, we consider that it is appropriate regulatory practice to adopt the same approach as for s93A undertakings.

3.9 Enforceable undertakings are made public through ASIC's company database and are free of charge. A free copy is also available from our website at www.asic.gov.au/euregister.

Disclosure to the market operator

3.10 If an enforceable undertaking is given by a company listed on a prescribed financial market, the company may be required under the listing rules of that market and s674 of the Corporations Act to release a copy of the undertaking to the market operator.

Note: For example, if a company is listed on the market operated by the Australian Securities Exchange Limited (ASX), this obligation may arise under ASX Listing Rule 3.1.

Varying or withdrawing enforceable undertakings

3.11 A promisor may withdraw or vary an enforceable undertaking only with our consent in writing: s93A(2) and 93AA(2).

3.12 Variations of an enforceable undertaking do not replace the original enforceable undertaking; they merely modify it.

3.13 We will only consider a request to vary an undertaking if:

- (a) the variation will not alter the spirit of the original undertaking;
- (b) compliance with the undertaking is subsequently found to be impractical; or
- (c) there has been a material change in the circumstances which led to the undertaking being given.

3.14 If a variation involves anything other than an extension of time, it is executed through a variation of enforceable undertaking document. This is offered by the promisor and accepted by us in the same manner as the original enforceable undertaking. The original enforceable undertaking should be annexed to the variation document. Both the original and the varied enforceable undertakings remain on our website and on our ASCOT database.

3.15 If a promisor requests an extension of time and we consider they have genuine reasons for why they are unable to comply with the specified time limits, we may informally grant an extension of time whilst reserving our rights to pursue an action for breach of the undertaking.

3.16 In exceptional circumstances, we may allow a promisor to withdraw an enforceable undertaking after we have accepted it. If we consent to the withdrawal, this means that the promisor is no longer bound by the terms of the undertaking. An example of an exceptional circumstance is where a licensee has asked us to revoke its licence and is no longer able to comply with the undertaking (nor is it necessary that it do so).

3.17 We will record withdrawals of enforceable undertakings on our ASCOT database.

Removal from public register

3.18 From time to time, companies have approached us after they have fulfilled all the obligations of an enforceable undertaking, seeking to have the undertaking removed from the public register. It is not our policy to remove an enforceable undertaking from the register.

3.19 The fact that an enforceable undertaking was accepted should remain on the public record and the register should remain a complete record of our use of this remedy.

Section 4: What happens if an enforceable undertaking is not complied with?

4.1 If we have reason to believe that a promisor has not complied with a term of an enforceable undertaking, we may apply to the court for appropriate orders. Cases for court action include where the breach of the enforceable undertaking:

- (a) is a significant breach; or

Note: For guidance on what we mean by significant breach in the context of Financial Services provision, see Regulatory Guide 78 *Breach reporting by AFS licensees* (RG 78).

- (b) involves a failure of the promisor to perform an obligation by a certain time.

4.2 We will publicise our application to the court and seek legal costs from the promisor when appropriate.

4.3 The court can:

- (a) direct the promisor to comply with the particular term;
- (b) direct the promisor to transfer money (up to the amount of any financial benefit it obtained directly or indirectly and that is reasonably attributable to the breach) to:
 - (i) the scheme property, if it is a responsible entity;
 - (ii) the Commonwealth, if it is an individual or company; or
 - (iii) any person who has suffered loss or damage as a result of the breach; or
- (c) make any other order that the court considers appropriate.

Note: See s93A(4) and 93AA(4) of the ASIC Act.

4.4 The aim of the court's orders are to compel the promisor to comply with the enforceable undertaking and to put all parties in the position they would have been in had the enforceable undertaking not been breached (e.g. by stripping benefit and compensating for loss).

4.5 A breach of an enforceable undertaking cannot itself be the subject of contempt proceedings. However, a breach of a court order granted because of a breach of the enforceable undertaking may constitute contempt of court.

Key terms

In this guide, these terms have the following meanings:

ASCOT ASIC's database of information on companies and other corporate bodies registered under the Corporations Act.

ASIC or we The Australian Securities and Investments Commission.

ASIC Act The *Australian Securities and Investments Commission Act 2001* including regulations made for the purposes of the ASIC Act.

CALDB The Companies Auditors and Liquidators Disciplinary Board.

Corporations Act The *Corporations Act 2001* including regulations made for the purposes of the Corporations Act.

promisor The party entering into an enforceable undertaking with ASIC.

s93A (for example) A provision of the *Australian Securities and Investments Commission Act 2001* unless otherwise stated (in this example numbered 93A).

Related papers

Regulatory guides

RG 47 *Public comment*

RG 78 *Breach reporting by AFS licensees*

RG 98 *Licensing: Administrative action against financial service providers*

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