

# Guideline

## **Enforceable undertakings under the *Environmental Protection Act 1994***

*This guideline has been prepared to provide information about the administering authority's expectations and management of enforceable undertakings under Chapter 10, Part 5 of the Environmental Protection Act 1994. The guideline also assists persons in preparing an enforceable undertaking and explains the way in which the administering authority will consider and decide whether to accept or reject an enforceable undertaking.*

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## What is an enforceable undertaking?

An enforceable undertaking (EU) is a voluntary binding agreement between the *administering authority*<sup>1</sup> and a *person* who is alleged to have contravened the *Environmental Protection Act (1994)* (the Act) and is a tool capable of being entered into as an alternative to prosecution. An EU is entered into by the person as a way to support environmental outcomes in response to alleged contraventions of the Act that would generally be considered appropriate for prosecution. An EU becomes binding once accepted and specifies the obligations and terms a person agrees to undertake to secure compliance with the Act (in relation to the alleged contravention that has resulted in the EU) and enhance the protection of the environment.

Where an EU is proposed as an alternative to prosecution, the administering authority's decision to delay and/or forego prosecution action is made on the basis that the EU appropriately addresses the alleged contravention and achieves an environmental outcome.<sup>2</sup> The person proposing the EU agrees to correct their misconduct, secure compliance with the Act and take actions to enhance the protection of the environment.

EUs are an efficient, flexible and transparent tool that achieves good environmental outcomes following an alleged contravention of the Act. The entering of an EU does not commit the state or the person subject to the EU to the costs of litigation and the associated costs of the court process; however the person may identify terms in the EU where there is financial outlay e.g. donating money to a conservation group or investing in research to improve industry effects on the environment.

The making of an EU does not constitute an admission of guilt by the person making the EU. However the details of an EU will form part of the compliance history of a person.

This guideline provides the applicant with information about what is required in an application and when an EU may or may not be accepted. The applicant is strongly encouraged to discuss their intentions of applying for an EU with the administering authority prior to submitting an application.

## When an enforceable undertaking will be accepted

Under section 507(6) of the Act, the administering authority may accept an EU at any time before *proceedings* end, in relation to an alleged contravention. The administering authority may also refuse to accept an EU if any delay in proposing an EU is considered to be unreasonable. For example, if a person proposes an EU the day before the matter is to go to trial, this delay in proposing the EU will likely be considered unreasonable and may be rejected by the administering authority.

If an investigation is underway at the time an EU is proposed and/or accepted, the administering authority may still continue to conduct the investigation.

If a proposed EU is received by the administering authority while proceedings are underway, the administering authority may seek to adjourn proceedings until a notice<sup>3</sup> of decision to accept or reject the EU has been given. If the administering authority accepts an EU after proceedings in relation to the contravention have started, under section 507(7) of the Act, the administering authority must take all reasonable steps to have the proceedings discontinued as soon as practicable. Section 507(4) of the Act provides that the administering authority must only accept an EU if the administering authority reasonably believes that the EU will:

- secure compliance with the Act; and
- enhance the protection of the environment.

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<sup>1</sup> Throughout this document, italicised words appear in the dictionary at the end of this guideline. Only the first expression of the word will be italicised. Note: some words are italicised because they refer to titles of legislation.

<sup>2</sup> The relevant provisions are set out in sections 507 to 513 of the Act.

<sup>3</sup> Refer to section 507(3) of the Act.

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The administering authority will accept an EU for alleged major or serious contraventions (excluding those contraventions that are *indictable* offences) of the Act, as an alternative to prosecution, in circumstances where the person has moderate or low culpability.

Applications for EUs will contain a unique set of facts and circumstances that require careful consideration by the administering authority. As such, the administering authority strongly recommends that a person who is considering applying for an EU undertakes early consultation with the relevant area of the administering authority prior to submitting an application.

### Examples of when EUs may be accepted:

- inadvertent or accidental acts;
- no serious prior non-compliance with environmental legislation or similar legislation;
- an isolated previous event of non-compliance with environmental legislation or similar legislation;
- non-compliance of short-term or medium-term duration;
- remediation has been effective or partially effective, or a demonstrated genuine attempt at remediation has been made;
- notification of the incident to the administering authority occurred within a reasonable timeframe;
- there was no motivation or intention to derive a financial or material benefit from the non-compliance;
- the impact or risk of impact resulting from the contravention was not reasonably foreseeable; or
- the impact or risk of impact was not prevented by high standards of operation.

### When an enforceable undertaking will be rejected

EUs cannot be accepted for alleged contraventions of the Act that are indictable offences. Accordingly, any offences committed wilfully cannot be the subject of an EU.

### Examples of when EUs may be rejected:

- the content of the EU does not address the alleged contravention(s) of the Act that are the subject of the EU, and does not address how this has been remedied or is being remedied;
- serious contraventions of the Act or similar legislation, involving high or serious levels of culpability;
- there was motivation or intention to derive a financial or material benefit from the non-compliance;
- failure to notify the administering authority or notification outside of reasonable timeframes;
- multiple contraventions that due to repetitive, ongoing circumstances, or taken cumulatively, would be considered serious;
- significant incidents involving considerable public interest;
- the person has been the subject of previous prosecutions for an environmental offence of a serious nature (whether in Queensland or elsewhere);
- the administering authority cannot be satisfied of ongoing compliance with the Act ;
- the likely outcome of the matter dealt with through legal proceedings would better achieve the objects of the Act;
- the investigation or prosecution proceedings are at an advanced stage; or

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- the commitments contained in a proposed EU impose an unreasonable delay in environmental remediation.

Refer to the department's enforcement guidelines on the department's website at <[www.ehp.qld.gov.au](http://www.ehp.qld.gov.au)> for further information about the department's approach to enforcement action.

### Developing an enforceable undertaking

EUs must be submitted to the administering authority using the approved application form. The application form ([ESR/2016/2133](#)) for submitting EUs to the Department of Environment and Heritage Protection is available from the department's website <[www.ehp.qld.gov.au](http://www.ehp.qld.gov.au)>.

### General information

An EU must be drafted in such a way that it includes the following general information to be considered by the administering authority:

- details of the person proposing the EU and any other relevant contact information;
- details of the circumstances which led to the alleged contravention, including the events surrounding the alleged contravention;
- a statement of regret that the alleged contravention occurred;
- a statement of commitment that the acts or omissions and any other factors which caused or led to the alleged contravention have ceased and that all reasonable endeavours have been and will be made to ensure they do not reoccur;
- the reasons that the person considers an EU is a more appropriate response to the alleged contravention than a court proceeding;
- an acknowledgment that the EU will be published on the administering authority's website. Section 507(5) of the Act requires that accepted EUs are published in this manner;
- a statement of financial ability to comply with the *terms* of the EU; and
- a statutory declaration outlining details of any prior convictions or findings of guilt under environmental protection legislation (whether in Queensland or elsewhere). This information will not be published but will be used by the administering authority in deciding whether to accept an EU.

### Objectives and terms of an enforceable undertaking

An EU must identify the key objectives. Objectives are broad environmental outcome statements that guide the scope of the EU to ensure compliance with the Act, and enhance the protection of the environment.

An EU must also consist of terms or detailed undertakings that describe how the objectives will be met. The terms of an EU must be drafted in such a way that they are prescriptive in nature - detailing how the objectives will be achieved, and the timeframe in which they are to be achieved. All EUs are required to contain terms relating to monitoring compliance with the EU. For example: A term requiring that a final report be submitted to the administering authority, detailing how the EU has been complied with.

Table 1 provides some general examples of terms which meet a proposed objective; however it should be noted that accepted terms may need to be more specific to the unique matter and offer further details than those outlined in these examples.

The objectives and terms of the proposed EU will be considered by the administering authority when deciding whether to accept or reject the EU. Due to the complexities associated with developing EUs, it is likely that the

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objectives and terms proposed in an EU application will be further negotiated between the administering authority and the person, as part of the decision to accept or reject the EU.

The terms of an EU must clearly identify measures and/or actions that not only remedy the non-compliance, but also enhance the protection of the environment.

### **Performance indicators and compliance commitment**

The EU must include the following terms and information:

- a term or terms to identify what monitoring and reporting will be being undertaken;
- a term or terms identifying that interim progress reports (at intervals to be negotiated) and a final compliance report will be provided to the administering authority;
- performance indicators for each objective that will allow the administering authority to assess whether compliance with the terms and objectives has been achieved;
- measurable actions and timeframes for completing the terms of the EU;
- estimated cost of complying with each of the key objectives stated in the undertaking; and
- detailed final costs (which addresses any disparity between the estimated cost and final costs) of compliance at the completion of the EU.

### **Acknowledgement of enforceable undertaking in communications**

The EU must include a term that any communications regarding a material benefit delivered as part of the EU (e.g. a donation to an environmental group) will clearly link the benefit to the EU and that the EU was entered into as a result of an alleged contravention of the Act. This is to ensure that the material benefit is not seen as a gesture of goodwill but as an act in response to an alleged contravention.

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TABLE 1: Examples of objectives and associated terms

Example Objectives	Example Terms <sup>4</sup>
<p><b>Improve environmental performance</b></p> <p>(Background - The EU must identify the failings in the person’s systems and/or management that led to the alleged contravention and make commitments to address these failings. The EU must also include commitments to improve on-site environmental performance which enhances the protection of the environment).</p>	<ul style="list-style-type: none"> <li>1.1. Investing resources into researching and utilising new technology that is relevant to the alleged contravention;</li> <li>1.2. Installing new infrastructure that will minimise the risk of <i>environmental harm</i> and that is above and beyond the infrastructure already required in order to have prevented the alleged contravention;</li> <li>1.3. Staff completing relevant training that was not previously taken;</li> <li>1.4. Strategies to deliver improvement in environmental performance which enhances the protection of the environment so that actions actually address the issues underlying/causing non-compliance (e.g. require systemic components such as compliance programs, implementation and/or upgrading of monitoring systems);</li> <li>1.5. Implementation of specified projects, such as special training programs to address particular needs for employees and management.</li> </ul>
<p><b>Deliver benefits to the environment and local community</b></p> <p>(Background - The EU must deliver a benefit to the environment and should benefit the local community if the community has been directly impacted by the alleged contravention. EU applications must demonstrate that affected community members have been consulted and details of the consultation must be provided. The EU must also detail the actions that will be taken and how these actions will deliver benefit to the environment and affected community when consulted).</p>	<ul style="list-style-type: none"> <li>2.1 Conducting, facilitating or funding research into an environmental issue relevant to the industry or the affected community;</li> <li>2.2 Promotion and education campaigns targeted to various sectors;</li> <li>2.3 Targeted publicity regarding the contravention or alleged contravention;</li> <li>2.4 Community service commitments, such as implementation of an industry-wide awareness program or publication of material dealing with the EU in relevant industry journals or newspapers, or in the affected community;</li> <li>2.5 Donation of funds to a not-for-profit organisation with a specific focus on environmental</li> </ul>

<sup>4</sup> Note: The example terms provided are just examples, and actual terms of an EU should be more specific, including detailing what will be achieved, how it will be done, and by when.

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	<p>programs;</p> <p><i>Note: where the undertaking includes a donation, the details of any relationships held with the beneficiaries must be disclosed as well as details of the method for communicating the reason for the donation to the beneficiary (e.g. the donation is a term of an EU entered into with the administering authority following an alleged contravention of the Act).</i></p> <p>2.6 Funding tertiary scholarships for environmental students in consultation with relevant universities.</p>
<p><b>Drive improvements in environmental performance across industry</b></p> <p>(Background - The EU should seek to improve the environmental performance of others within the industry).</p>	<p>3.1 Employing and/or funding environmental management expertise within the operation and/or industry;</p> <p>3.2 Sharing the outcomes of research;</p> <p>3.3 Engaging in industry forums to communicate the objectives of the EU and knowledge gained through compliance with the EU;</p> <p>3.4 Educating other industry members and assisting them to implement similar changes to infrastructure, systems or processes;</p> <p>3.5 Strategies to drive improvements in environmental performance industry-wide (e.g. funding for industry education programs, environmental protection advertisements in industry magazines or research into preventative schemes);</p> <p>3.6 Assisting in, or funding, the development of industry standards relevant to the person's industry.</p>
<p><b>Administration of the EU (general terms that may be included)</b></p>	<p>4.1 A requirement for the person to pay the administering authority's investigation costs which may include:</p> <ul style="list-style-type: none"> <li>4.1.1 legal and administrative costs (e.g. those costs incurred by the administering authority to reach the point of accepting an EU); or</li> <li>4.1.2 projected costs for monitoring compliance with the undertaking; and</li> </ul> <p>4.2 A commitment to advertise the notice of decision to accept an EU in a newspaper circulating</p>

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	<p>generally in the area of the alleged contravention.</p> <p>4.3 A commitment to provide a final report to the administering authority detailing how the terms of the EU have been completed, including the total cost of financial outlays.</p>
<p><b>Rectification and remediation of non-compliance (to secure compliance with the Act)</b></p>	<p>5.1 Undertake a clean-up of the affected area, that was impacted by the alleged contravention;</p> <p>5.2 Drain dredge ponds immediately to prevent further runoff and maintain their levels below that which is considered reasonable by the administering authority;</p> <p>5.3 Fix the faulty equipment which led to the alleged contravention occurring;</p> <p>5.4 Take actions to prevent any further offsite contamination caused by the runoff of contaminated water;</p> <p>5.5 Take actions to remove all contaminated waters from the site including any future contaminated waters that may occur following a rain event;</p> <p>5.6 Engage an appropriately qualified person to assess the environmental impacts and to develop an investigation and rehabilitation plan for the site, including offsite lands and groundwater, as a result of the alleged contravention.</p>



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### Unacceptable terms

An EU must not include the following unacceptable terms:

- terms which only seek to remedy non-compliance and do not also seek to enhance the protection of the environment;
- a denial of guilt or responsibility for the alleged contravention (however an admission of guilt or responsibility is not required);
- any terms which may set up defences for possible non-compliance with the EU;
- any terms which may set up defences for possible future contraventions of the Act;
- any terms which will result in an unreasonable delay in environmental remediation; and
- any terms that may impose an obligation on the administering authority or any other person without the person's consent.

If any of these unacceptable terms are included in a proposed EU, it may be rejected by the administering authority.

### Decision timeframe

The Act does not provide a timeframe for the administering authority to decide whether to accept or reject an EU. Each EU is an individual document, addressing case-specific environmental objectives and differing commitments. Following receipt of an EU application, the administering authority will contact the person nominated on the application form to commence the negotiation process of the terms of the proposed EU to ensure that the EU adequately addresses the alleged contravention/s, secures compliance with the Act and enhances the protection of the environment. Additionally, the timeframe for deciding an EU will also depend on:

- the environmental issues associated with the alleged contravention;
- the information supplied to the administering authority with the EU;
- a review of the compliance history of the person who is proposing the EU;
- whether proceedings or other enforcement action has already been commenced (and the status of these proceedings/enforcement actions); and
- the corresponding commitments in the EU.

### When does an enforceable undertaking take effect?

Under section 508(1) of the Act, an EU takes effect when the administering authority gives the person who proposed the EU a notice of the decision to accept the undertaking.

### Publication

When an EU is accepted, a copy of the EU must be published in a timely manner on the administering authority's website. The Act also requires the administering authority to keep a register of accepted EUs.

### Managing an accepted enforceable undertaking

#### Withdrawal or variation of an enforceable undertaking – initiated by the person

Under section 509(1) of the Act, a person who has had an EU accepted by the administering authority may, at any time seek written agreement from the administering authority to:

- withdraw the EU; or

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- vary the EU.

Requests to vary an EU may be appropriate where:

- certain terms are found to be impractical;
- there has been a material change in the circumstances to which the EU relates; or
- there are extenuating reasons provided for the administering authority to consider.

An EU may not be varied to provide for a different alleged contravention of the Act.

When deciding whether to agree to a variation, the administering authority may consider the effectiveness of the existing EU and whether the proposed variation alters the spirit or intent of the original EU. For example, the administering authority may agree to vary an EU to extend the time required to achieve the terms and obligations set by the EU if a significant weather event has impacted on the person's ability to comply with the EU. In varying an EU, it may be that only one or two objectives and the subsequent terms are varied at the request of the person, as opposed to varying the whole EU.

Requests to withdraw an EU will be considered in exceptional circumstances. When considering a request to withdraw an EU, the administering authority may consider whether the person has fully performed its obligations under the EU. If the person has not fully or substantially performed its obligations, the administering authority will likely refuse to withdraw the EU.

If the EU is withdrawn or varied, the administering authority must publish a notice of the withdrawal or variation on the administering authority's website.

### **Amending an enforceable undertaking – initiated by administering authority**

Under section 510 of the Act, the administering authority may amend an EU, with the written agreement of the person. Generally an amendment by agreement will occur where the requirements of an EU are found to be unforeseeably impractical or an amendment is necessary to fix issues with the EU, where circumstances have changed due to unforeseen influences.

The administering authority may also amend an EU, without agreement<sup>5</sup> if:

- the amendment does not adversely affect the interests of the person subject to the EU or anyone else; and
- the person has been given written notice of the amendment.

If the administering authority amends an EU, a notice will be published regarding the amendment on the administering authority's website.

### **Amending or suspending – after show cause process – initiated by administering authority**

The administering authority may amend or suspend an EU, following a show cause process, if the following grounds are satisfied, as outlined in section 512 of the Act:

- The EU was accepted based on false or misleading representations or declarations;
- The EU was accepted due to a miscalculation of the impact of the alleged contravention on the environment;
- It is necessary and desirable because of an environmental audit, investigation or report under chapter 7, part 2;

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<sup>5</sup> Refer to section 511 of the Act.

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- It is necessary and desirable because of a significant change in the way or the extent to which the relevant activity is carried out that affects the ability to meet the requirements of the EU.

Suspension of the EU will extinguish the person's obligations under the EU for a stated period of time. The EU is not active once it has been suspended, for the duration of the suspension period.

### **Notice of proposed action to amend or suspend**

If the administering authority believes that one or more of the above grounds is satisfied, the administering authority must give the person subject to the EU a notice that states:

- the action that the administering authority proposes to take;
- if the action is an amendment of the EU – the proposed amendment;
- if the action is a suspension of the EU – the period of the suspension;
- the grounds for taking the action;
- the facts and circumstances that are the basis for the grounds;
- that the person may make written representations to show why the action should not be taken; and
- the period, of at least 20 business days after the person is given the notice, within which the person may make the representations.

If the administering authority is proposing to amend the EU, the notice must be accompanied by a copy of the EU that shows the amendment. The administering authority must consider any written representation the person makes within the period stated in the notice. If the administering authority still believes a ground exists to take the action, the administering authority may decide to take the action.

### **Information notice about the decision to take the action**

If the administering authority decides to take the proposed action, the administering authority must give the person an information notice about the decision within 10 business days after making the decision.

### **Notice of decision not to take the action**

If the administering authority, at any time, decides not to take the proposed action, the administering authority must promptly give the person written notice of the decision.

### **Finalisation of an enforceable undertaking**

The EU will remain in force for the period stated in the EU or until further notice from the administering authority.

A final report by the person describing how all of the terms of the EU were achieved must be submitted to the administering authority within one month of the final term being completed. If the administering authority is satisfied that all terms have been completed, it will notify the person that the EU is no longer in force. The EU is then finalised and remains on departmental file, forming part of the compliance history of the person.

### **Enforceable undertaking not privileged**

The Act does not provide privilege for the giving of an EU, the EU itself and any documents submitted with the EU. Therefore, this information is admissible as evidence in proceedings against the person for the original offence (the subject of the EU).

### **Contravening an enforceable undertaking**

#### **Penalties for non-compliance with an enforceable undertaking**

It is an offence under section 513 of the Act to contravene an EU that is in effect.

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- The maximum penalty for an individual is 4500 penalty units.
- The maximum penalty for a corporation is 22,500 penalty units.
- The maximum penalty for an individual who wilfully contravenes an EU is 6250 penalty units or 5 years imprisonment.
- The maximum penalty for a corporation that wilfully contravenes an EU is 31,250 penalty units.

### Proceedings

Where a person is complying, or has complied with all terms of an EU, proceedings cannot be commenced against the person in relation to the alleged contravention that is the subject of the EU.

However, if an EU is contravened, the administering authority may apply to a Magistrates Court<sup>6</sup> for a court order, and/or may commence proceedings against the person who has contravened an EU for contravention of the EU. Additionally, the administering authority may consider commencing proceedings against the person for the original offence (the subject of the EU) as well as for the contravention of the EU.

Under provisions of the Act, the court may make any other order that the court considers appropriate in the circumstances, including an order directing the person to pay to the administering authority:

- the costs of the proceedings; and
- the reasonable costs of the administering authority in monitoring compliance with the EU in the future.

If an EU has been withdrawn or suspended, the administering authority may commence proceedings for the original offence (the subject of the EU).

### Review of decisions and appeals

There are no rights of review or appeal under the Act against a decision to accept or reject an EU. However the decision to amend, vary or suspend an EU is an original decision and can be reviewed.

Generally, a request to have a decision reviewed must be made:

- within 10 business days of the person being notified of the decision;
- be supported by enough information to enable the administering authority to decide the application for review; and
- be made using the application for review of original decision form ([ESR/2015/1573](#)) when applying to the department.

Where an application has been made for a decision to be reviewed, the applicant may also apply to the relevant court for a stay of the decision to secure the effectiveness of the review.

Once the original decision has been reviewed, a person who is dissatisfied with the review decision may be able to appeal against that decision to the relevant court within 22 business days after receiving notice of the review decision.

For further information about reviews and appeals see the Information sheet - Internal review and appeal to the Planning and Environment Court ([ESR/2015/1572](#)).

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<sup>6</sup> Refer to section 513, subsections 2 to 4

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### Definitions

Where a term is not defined in this document, the definition in the Act, its regulations and environmental protection policies, the *Acts Interpretation Act 1954*, and the Macquarie Dictionary should be used, in that order to define the term.

Administering authority	(a) for a matter, the administration and enforcement of which has been devolved to a local government under section 514—the local government; or  (b) for another matter—the chief executive of the Department of Environment and Heritage Protection (or its successor or predecessors).
Environmental harm	As defined in section 14 of the Act - is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.
Indictable offences	Defined under the Act as offences where the maximum penalty is imprisonment of two years or more. Many indictable offences have an element of wilfulness in the commission of the offence.
Non-compliance/ contravene	Breach or fail to comply with.
Person	A legal entity or 'person' includes an individual and a corporation.
Proceedings	Means a legal or other action or proceeding.
Undertaking	Formal promise or pledge.
Terms	Conditions or stipulations limiting what is proposed to be granted or done.

### Version history

Version	Effective date	Description of changes
1.01	21 September 2015	Initial upload.
2.00	21 July 2016	The document template, header and footer have been updated to reflect current Queensland Government corporate identity requirements and comply with the Policy Register.