



A guide for business

# Section 87B of the Competition and Consumer Act

Guidelines on the use of enforceable undertakings  
by the Australian Competition and Consumer Commission

April 2014



These guidelines outline the Australian Competition and Consumer Commission's current approach to administering s. 87B in connection with its enforcement activities.

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# Introduction

Section 87B of the *Competition and Consumer Act 2010* (CCA) gives the Australian Competition and Consumer Commission (ACCC) the ability to accept written undertakings in the exercise of its powers under the CCA (other than Part X)—and for the enforcement of such undertakings in the Federal Court of Australia.<sup>1</sup>

Parties that give such undertakings may subsequently withdraw or vary them only with the consent of the ACCC.

The ACCC regards s. 87B as an important compliance tool for use in situations where there is evidence of a breach, or a potential breach, of the CCA that might otherwise justify litigation.

These guidelines outline the ACCC's current approach to administering s. 87B in connection with its enforcement activities.

Undertakings relating to matters involving a merger are covered by *Merger guidelines 2008*, released on 21 November 2008. For more information on merger undertakings, contact the ACCC Infocentre on 1300 302 502.

Sample guides of s. 87B undertakings are at attachments A and B.

The text of s. 87B is at attachment C.

## Enforcement of the Competition and Consumer Act—overview

The ACCC is Australia's peak consumer protection and competition agency. It is an independent statutory government authority serving the public interest. Most of the ACCC's enforcement work is conducted under the provisions of the CCA, the purpose of which is to enhance the welfare of Australians by:

- promoting competition among business
- promoting fair trading by business
- providing for the protection of consumers in their dealings with business.

The CCA provides the ACCC with a range of enforcement remedies, including court based outcomes and court enforceable undertakings given pursuant to s. 87B of the CCA. The ACCC also resolves many matters administratively through direct engagement with the trader.

### Enforcement aims

In enforcing the provisions of the CCA, the ACCC's primary aims are to:

- stop the unlawful conduct
- deter future offending conduct
- undo the harm caused by the contravening conduct (e.g. by corrective advertising or restitution for consumers and businesses adversely affected)
- encourage the effective use of compliance systems
- where appropriate, punish the wrongdoing by the imposition of penalties or fines.

### Response to complaints

The ACCC cannot pursue all of the complaints it receives. While all complaints are carefully considered, the ACCC exercises its discretion to direct resources to the investigation and resolution of those matters that provide the greatest overall benefit for consumers and businesses.

To assist with this determination, the ACCC gives enforcement priority to matters that demonstrate one or more of the following factors:

- conduct of significant public interest or concern
- conduct resulting in a substantial consumer (including small business) detriment
- unconscionable conduct, particularly involving large national companies or traders which impacts on consumers and small businesses
- conduct demonstrating a blatant disregard for the law
- conduct involving issues of national or international significance

<sup>1</sup> Section 218 of the Australian Consumer Law (ACL) contained in Schedule 2 of the CCA also provides ACL regulators with the ability to accept court enforceable undertakings. While the ACCC continues to employ s. 87B of the CCA, should it accept undertakings under s. 218 of the ACL, it would employ similar principles as set out in this guide.

- conduct detrimentally affecting disadvantaged or vulnerable consumer groups
- conduct in concentrated markets which impacts on small business consumers or suppliers
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
- where ACCC action is likely to have a worthwhile educative or deterrent effect, and/or
- where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair trading laws.

Legal proceedings continue to be a major focus of the ACCC's work, because of the significant effects of court decisions. However, the ACCC also uses a range of responses in its compliance and enforcement activities. In deciding which compliance or enforcement tool (or a combination of such tools) to use, the ACCC's first priority is always to achieve the best possible outcome for the community. For example, in appropriate cases, as well as accepting a s. 87B undertaking, the ACCC may also seek additional remedies to resolve its concerns, such as issuing an Infringement Notice/s.

## Section 87B undertakings

For many years the ACCC has in appropriate circumstances employed resolutions, based on undertakings given by the business or individuals concerned under s. 87B of the CCA, as alternatives to costly and lengthy court processes. Such resolutions allow the ACCC to seek efficient and innovative outcomes in cases where litigation is not instituted.

Section 87B has the advantage of greatly increasing the effectiveness of resolving matters that do not proceed to litigation because s. 87B undertakings are ultimately enforceable in court. Examples of the type of redress sought by the ACCC in previous matters include:

- corrective advertising in the print and electronic media
- refunds to affected consumers
- community service remedies
- industry-wide education programs funded by the company/business providing the undertaking.

In negotiating such resolutions, the ACCC's broad objectives are:

- cessation of the conduct leading to the alleged breach
- redress for parties adversely affected by the conduct
- implementation of compliance measures to help prevent future breaches by the company/business concerned
- general education and deterrence, particularly in the industry concerned, by way of public awareness.

The ACCC does not consider s. 87B settlements to be a 'soft option' and does not accept them lightly.

This publication outlines the circumstances in which such settlements are appropriate and the detailed criteria adopted by the ACCC in their negotiation and acceptance.

**These guidelines do not cover the potential use of s. 87B undertakings in the ACCC's non-enforcement functions.**

## When are s. 87B undertakings appropriate?

The ACCC seeks to resolve matters under s. 87B only when it believes that a breach has occurred, or was likely to have occurred, and that a resolution based on enforceable undertakings offers the best solution.

When deciding between litigation and accepting an undertaking pursuant to s. 87B of the CCA, the ACCC opts for the approach that it considers will produce the best results—in terms of lasting compliance with the law and redress for injured parties. The ACCC will be influenced by factors such as:

- the nature of the alleged breach in terms of:
  - the seriousness of the conduct involved
  - the impact of the conduct on third parties and the community at large
  - the product or service involved
  - the size of the company/business involved
- the ability of a s. 87B undertaking to offer redress to affected consumers and businesses
- the history of complaints and/or ACCC action against the company, business or individuals involved
- the history of complaints and/or ACCC action involving the practice, the product or the industry generally
- prospects for rapid resolution of the matter
- the apparent good faith of the company/business.

This list is not exhaustive. Often other considerations arise that reflect the particular circumstances of the alleged breach.

# Acceptance of undertakings

The ACCC does not have the power to demand or require a s. 87B undertaking, but may raise it as an option, leaving the other party to decide whether to pursue it.

ACCC staff will often canvass the possibility of a s. 87B undertaking during their investigation of a matter—though never at the outset. In doing so, they may give advice that reflects the ACCC's general attitude to the matter, without pre-empting the Commission's ultimate decision on whether to accept an undertaking in resolution of its investigation.

It is important to understand that ACCC staff are not empowered to accept undertakings—that is the responsibility of the Commission itself.

## Typical elements of a s. 87B undertaking

Section 87B undertakings must be in writing (this is required by law), detailed, specific and free from ambiguity.

While the content of each undertaking is subject to negotiation between the ACCC and the party concerned, most undertakings accepted by the Commission are generally of substance and directly address the conduct that has given rise to the alleged breach and its consequences. An undertaking usually includes the following elements:

- an acknowledgment or admission from the company or business that the conduct of concern constitutes or was likely to constitute a breach of the CCA
- a positive commitment to cease the conduct and not recommence it
- specific details of the corrective action that will be taken by the company or business to remedy the harm caused by the conduct
- details of redress (such as payment of compensation or reimbursement to consumers) where appropriate—including a mechanism to determine and audit the outcome
- positive reporting requirements from the company or business to the ACCC that may include:
  - a report as to when the company has satisfied its undertaking obligations
  - the provision of supporting information and documentation by the company to the ACCC to verify that it has in fact satisfied its undertaking obligations
- firm future actions aimed at preventing a recurrence or any other breach of the CCA (such as an internal compliance and/or training program), including timeframes and other details
- an acknowledgment that:
  - the ACCC will make the undertaking publicly available including by placing it on the ACCC's public register of s. 87B undertakings on its website
  - the ACCC will make public reference to the undertaking, from time to time, including in news media statements and in ACCC publications
  - this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Some of these matters are discussed in more detail below.

## Unacceptable terms

Undertakings will not be accepted by the Commission if they include:

- a denial that the conduct breached the CCA
- any terms imposing obligations on the ACCC
- a specific requirement that the ACCC will not in future institute proceedings in the particular matter
- a statement that the undertaking is not an admission for the purposes of third party actions (although they need not explicitly state that it is such an admission)
- terms imposing obligations on third parties
- terms purporting to set up defences for possible non-compliance
- statements that the conduct was inadvertent
- self-serving statements by the company or business that seek to minimise the consequences of the conduct or for public relations or promotional purposes.

In most circumstances acceptance of a s. 87B undertaking will resolve the matter; however, there may be circumstances in which the ACCC negotiates and accepts an undertaking while continuing to investigate with a view to possible legal proceedings in relation to the same or a related matter.

## Section 87B undertaking template

While there is no fixed form for an undertaking, the following framework is often used:

- persons giving the undertaking
- background
- the undertaking
- acknowledgments
- the parties giving the undertaking
- a brief description of the company and the relevant conduct
- what the company undertakes to do
- the company acknowledges that the undertaking will be made publicly available and will be referred to publicly.

This framework is reflected in the template at attachments A and B.

## Corrective action and compensation

In the resolution of any matter, the ACCC is concerned with finding ways to remedy the harm caused by the alleged breach.

Of paramount concern are mechanisms for compensation, reimbursement or other appropriate forms of redress for parties adversely affected by the conduct.

Other forms of corrective action are dictated by the circumstances of the breach. For example, in cases of misleading advertising, the ACCC may require unequivocal corrective advertising that will reach the same target audience as the original campaign.

## Compliance programs

In many s. 87B settlements the ACCC will require the company or business concerned to undertake a program to improve its overall compliance with the CCA.

To achieve greater consistency and utility in compliance program requirements in s. 87B undertakings, the ACCC has developed four specific compliance program template undertakings. These templates contain a variety of compliance program elements, including:

- formalisation of the company's compliance policy, supported by the commitment of the board and senior management
- assignment of responsibility for the compliance program to a named senior manager
- appointment of a specialist compliance officer and compliance advisor to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management
- conduct of a thorough risk assessment
- regular internal review and reporting to the board of the continuing effectiveness of the compliance program
- development of a compliance training program
- delivery of the training program a specified number of times over a specified period to key personnel groups within the organisation—such groups to be identified at the time of entering into the undertaking or otherwise after an audit to identify the areas of the company/business at risk of breach
- implementation of a complaints-handling system
- supply of documents to the ACCC
- commitment to an independent review of the program at regular intervals (usually annually) for a specified period (usually three years).

In determining the specific combination of terms appropriate for a particular undertaking, the ACCC considers factors such as the size of the business and the nature of the alleged breach.

The ACCC will not involve itself in the implementation of tailored compliance programs resulting from s. 87B undertakings, but may undertake industry-wide compliance activities in some cases.

Digital copies of the four compliance program templates can be accessed through the ACCC website:

['Implementing a compliance program'](#).

## Public awareness

The ACCC's view is that all s. 87B undertakings should be a matter of public record and open to public scrutiny.

The ACCC's policy is therefore to make them publicly available, including by placing them on its public register of s. 87B undertakings on its website and to refer to undertakings in news media statements, in ACCC publications and in any other manner appropriate to the particular matter.

It may be possible to grant confidentiality to some aspects of a s. 87B undertaking involving genuinely commercially sensitive information.

Companies/businesses giving undertakings under s. 87B are required, as part of the process, to acknowledge that they are aware of the ACCC's policy on public awareness.

## Compliance with undertakings

Following acceptance of an undertaking, the ACCC requires that its implementation and effectiveness be monitored. Monitoring will generally be the responsibility of the company/business concerned.

To assist in monitoring compliance, the ACCC has, as a standard practice, sought the inclusion of provisions requiring relevant information to be made available to it:

- periodically—for example, a periodic audit of compliance with the undertaking
- in specified circumstances—for example, where there is an event of default, information relating to that default (such as the reasons for it), or
- upon the ACCC's request.

As mentioned previously, the ACCC will also usually require a commitment to an independent audit of the compliance program elements of the undertaking at regular intervals (usually annually) for the period of the undertaking (usually three years). Where it has reason to believe that a business has not complied with an undertaking, the ACCC will usually first try to resolve the matter by consultation.

If this approach fails, the ACCC will not hesitate to apply to the court for appropriate orders. The ACCC will make public its application to the court and will seek legal costs from the offending party where appropriate.

Section 87B provides that the court, if it is satisfied that a person has breached a term of the undertaking, may make all or any of the following orders:

- an order directing compliance with the undertaking
- an order for the party to pay an amount up to the amount of any financial benefit that can be reasonably attributed to the breach
- any order the court considers appropriate to compensate any other person who has suffered loss or damage as a result of the breach
- any other order that the court considers appropriate.

The ACCC has commenced Federal Court of Australia proceedings several times in recent years in response to breaches of s. 87B undertakings—for example, in *Australian Competition and Consumer Commission v StoresOnline International, Inc* [2007] FCA 1597 and *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 375. In these two instances, the court found that the respondent company had breached its undertaking and ordered it to pay the ACCC's costs.

## Variations

Under s. 87B(2) parties may withdraw or vary undertakings with the consent of the ACCC. This allows negotiations for changes if undertakings are subsequently found to be too hard to comply with, impractical or where circumstances change.

The ACCC will consider any reasonable requests as long as they do not alter the spirit of the original undertaking. Variations will be made public in the same way as the original s. 87B—that is, by publishing variations to an undertaking on its website and by referring to the variation in news media statements, in ACCC publications and in any other manner appropriate to the particular matter.

# Attachment A

## Sample (guide) undertaking

### Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by [Company and ACN or ABN].

#### 1. Person(s) giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by [insert full name of Company] ACN [insert ACN or ABN] ([Company]), for the purposes of section 87B of the *Competition and Consumer Act 2010* (CCA).

#### 2. Background

- 2.1 [Description of Company's business and activities relevant to investigated conduct]
- 2.2 [Description of the conduct the subject of the ACCC investigation]
- 2.3 [Explanation of why the ACCC considers the conduct to contravene the Act]
- 2.4 [Response from Company—for example: In response to the ACCC's investigation, Company has:
  - (a) [admitted] [acknowledged] that its conduct was likely to have contravened section 18 of the Australian Consumer Law (ACL) contained in Schedule 2 of the CCA, and
  - (b) offered this Undertaking to the ACCC.]

#### 3. Commencement of this Undertaking

- 3.1 This Undertaking comes into effect when:
  - (a) this Undertaking is executed by [Company], and
  - (b) this Undertaking so executed is accepted by the ACCC (the Commencement Date).

#### 4. Undertaking

- 4.1 [Company] undertakes for the purposes of section 87B of the CCA that:
  - (a) it will not, in trade or commerce, #####
  - (b) that it will:
    - (i) #####
    - (ii) #####
    - (iii) #####

If inclusion of compliance program obligations is required, insert here in the following format:

- (iv) establish and implement a Trade Practices Compliance Program (Compliance Program) in accordance with the requirements set out in "Annexure X", being a program designed to minimise [Company name]'s risk of future breaches of [INSERT: relevant sections or parts of the Act] and to ensure its awareness of the responsibilities and obligations in relation to the requirements of [INSERT: relevant sections or parts of the Act] within X months of the date of this Undertaking coming into effect
- (v) maintain and continue to implement the Compliance Program for a period of X years from the date of this Undertaking coming into effect, and
- (vi) provide, at its own expense, a copy of any documents required by the ACCC in accordance with Annexure X.



**5. Acknowledgments**

5.1 [Company] acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC’s public register of section 87B undertakings on its website
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct, and
- (d) [a summary of the ACCC Compliance Program review reports referred to in Annexure # of this Undertaking may be held with this Undertaking in the public register].

**Executed as an Undertaking**

Executed by [insert full name of Company] [insert ACN or ABN] pursuant to section 127(1) of the *Corporations Act 2001* by:

\_\_\_\_\_  
Signature of director

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

\_\_\_\_\_  
Name of director (print)

\_\_\_\_\_  
Name of director/company secretary (print)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

\_\_\_\_\_  
Date

and signed on behalf of the Commission:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Date

# Attachment B

## Sample (guide) undertaking for conduct under both CCA and TPA

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Trade Practices Act 1974* (Cth) and *Competition and Consumer Act 2010* (Cth) by [Company and ACN or ABN]

### 1. Person(s) giving the Undertaking

1.1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by [insert full name of Company] ACN [insert ACN or ABN] ([Company], for the purposes of:

- (a) section 87B of the *Trade Practices Act 1974* (TPA), as applied by Item 6 of Schedule 7 of the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*, for conduct engaged in prior to 1 January 2011, and
- (b) section 87B of the *Competition and Consumer Act 2010* (CCA), for conduct engaged in from 1 January 2011.

### 2. Background

2.1 [Description of Company's business and activities relevant to investigated conduct]

2.2 [Description of the conduct the subject of the ACCC investigation]

2.3 [Explanation of why the ACCC considers the conduct to contravene the Act]

2.4 [Response from Company—for example: In response to the ACCC's investigation, Company has:

- (a) [admitted] [acknowledged] that its conduct was likely to have contravened section 52 of the TPA and section 18 of the Australian Consumer Law (ACL) contained in Schedule 2 of the CCA, and
- (b) offered this Undertaking to the ACCC.]

### 3. Commencement of this Undertaking

3.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by [Company], and
- (b) this Undertaking so executed is accepted by the ACCC (the Commencement Date).

### 4. Undertaking

4.1 [Company] undertakes for the purposes of section 87B of the TPA and section 87B of the CCA that:

- (a) it will not, in trade or commerce, #####
- (b) that it will:
  - (i) #####
  - (ii) #####
  - (iii) #####

If inclusion of compliance program obligations is required, insert here in the following format:

- (iv) establish and implement a Trade Practices Compliance Program (Compliance Program) in accordance with the requirements set out in "Annexure X", being a program designed to minimise [Company name]'s risk of future breaches of [INSERT: relevant sections or parts of the Act] and to ensure its awareness of the responsibilities and obligations in relation to the requirements of [INSERT: relevant sections or parts of the Act] within X months of the date of this Undertaking coming into effect
- (v) maintain and continue to implement the Compliance Program for a period of X years from the date of this Undertaking coming into effect, and
- (vi) provide, at its own expense, a copy of any documents required by the ACCC in accordance with Annexure X.

## 5. Acknowledgments

5.1 [Company] acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct, and
- (d) [a summary of the ACCC Compliance Program review reports referred to in Annexure # of this Undertaking may be held with this Undertaking in the public register].

### Executed as an Undertaking

Executed by [insert full name of Company] [insert ACN or ABN] pursuant to section 127(1) of the *Corporations Act 2001* by:

\_\_\_\_\_  
Signature of director

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

\_\_\_\_\_  
Name of director (print)

\_\_\_\_\_  
Name of director/company secretary (print)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

\_\_\_\_\_  
Date

and signed on behalf of the Commission:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Date

# Attachment C

## Text of s. 87B

### Section 87B Enforcement of undertakings

- (1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).
- (1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a clearance or an authorisation under Division 3 of Part VII.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.
- (3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
  - (a) an order directing the person to comply with that term of the undertaking
  - (b) an order directing the person to pay to 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
  - (c) 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
  - (d) any other order that the Court considers appropriate.

# Attachment D

## Other ACCC information/publications

The ACCC has developed four compliance program templates for use in formulating undertakings. The templates differ in the number of elements present and the obligations conferred, and are therefore applicable to companies and businesses of varying sizes. Companies and businesses should seek independent advice on which template is appropriate for them. These templates are available on the ACCC website [www.accc.gov.au](http://www.accc.gov.au) '[Implementing a compliance program](#)'.

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Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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