



Guidelines on ACCC approach to court enforceable undertakings

September 2024

Acknowledgment of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission
Land of the Ngunnawal people
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Introduction

The Australian Competition and Consumer Commission (ACCC) uses a range of tools to encourage compliance and address contraventions of the *Competition and Consumer Act 2010* (Cth) (CCA). This includes accepting written court enforceable undertakings given by persons under section 87B of the CCA¹ (undertakings).

Undertakings may be accepted by the ACCC in addition to, or as an alternative to, other enforcement action. For example, undertakings may be accepted along with payment of infringement notices or as part of settlement of court proceedings brought by the ACCC.

These guidelines provide an overview of undertakings and the ACCC's current approach to negotiating, accepting, and administering undertakings in connection with its enforcement activities only. Merger undertakings are separate and are covered by [merger remedies to address concerns with an acquisition](#).

These guidelines cover undertakings related to consumer fair trading, competition (excluding mergers), consumer data right and product safety matters. Given the wide variety of circumstances that may arise, the guidelines are not intended to be applied as inflexible rules, but rather should be considered as indicative of the ACCC's approach. The guidelines may be revised from time to time.

A template undertaking is provided at **Attachment A**.

A copy of section 87B of the CCA is included at **Attachment B**.

Undertakings

An undertaking contains a series of commitments provided by a business or individual in writing to the ACCC. As noted above, undertakings may serve as a substitute for, or be an additional element of, other enforcement action by the ACCC. Undertakings can be more cost-effective, timely and provide tailored redress for consumers or businesses when compared with other enforcement action.

The ACCC has the power to accept undertakings in relation to a broad range of matters. Undertakings must have a "connection" with a matter in relation to which the ACCC has a power or function under the CCA², a gas market instrument or the consumer data rules.

The ACCC may accept an undertaking to address compliance concerns, even absent conduct that likely rises to the level of a contravention, as long as it relates to a power or function of the ACCC.

The ACCC does not consider undertakings to be a 'soft option' and does not accept them lightly.

1 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 typically accepts undertakings under section 87B of the CCA, the guidance in this document also applies to undertakings accepted by the ACCC under section 218 of the ACL.

2 Part X of the CCA, which regulates international liner shipping of cargo to and from Australia, is out of scope of section 87B of the CCA.

When are undertakings appropriate?

When deciding whether or not to exercise its discretion to accept undertakings, the ACCC's broad objectives are to:

- stop the concerning conduct
- provide redress for consumers and businesses adversely affected by the conduct
- encourage lasting compliance with the law to help prevent future breaches
- increase public awareness and promote general education and deterrence.

The ACCC will consider factors including, but not limited to:

- the nature of the concerning conduct in terms of the:
 - seriousness and deliberateness of the conduct
 - seniority of business representatives involved
 - impact of the conduct and vulnerability of consumers, businesses and the community at large
 - product or service involved
 - size of the business involved
- alignment with the ACCC's compliance and enforcement priorities
- what action, if any, has already been taken to remedy and address harm to consumers or businesses
- the ability of an undertaking to offer redress to affected consumers and businesses
- pre-existence of effective compliance programs, including compliance training and complaints handling systems (e.g., self-disclosure of concerning conduct)
- the ability of the business or individual to comply with and implement the terms of an undertaking
- the compliance history of the business or individual involved
- the complaints history involving the practice, the product or the industry generally
- the educative and/or deterrent effect of enforcement action
- prospects for an efficient resolution of the matter
- the apparent good faith of the business or individual.

Acceptance of undertakings

Undertakings can be an effective and flexible remedy to address concerning conduct. The ACCC does not have the power to compel or require a business or individual to offer an undertaking. It is the decision of the business or individual to decide whether to offer an undertaking to the ACCC.

While an ACCC case team may canvass the possibility of an undertaking, discuss potential terms and make suggestions about which terms might be acceptable to the ACCC, they are not empowered to accept undertakings. This is ultimately the responsibility of, and a decision for, the Commission and

will depend on the facts of the matter. An undertaking offered by a business or individual will only take effect once the undertaking is signed by the parties.

Acceptance of an undertaking will usually resolve the matter. However, there may be circumstances in which the ACCC negotiates and accepts an undertaking while continuing to investigate the same or a related matter with a view to taking further enforcement action.

The ACCC will consider whether or not to accept an undertaking on a case by case basis. The ACCC's acceptance of an undertaking in a particular set of circumstances should not be regarded as binding in similar circumstances in the future, nor will it limit the ACCC's assessment of what conduct may or may not amount to a contravention in other circumstances.

Terms of an undertaking

Undertakings must be in writing, provide sufficient details and be free from ambiguity. Terms must be clear and able to be monitored and complied with.

While the terms of each undertaking are subject to negotiation between the ACCC and the business or individual concerned, an undertaking usually includes the following elements to address, remedy, mitigate or compensate for harms caused by concerning conduct:

- an admission from the business or individual that the conduct of concern breached or is likely to have breached the CCA. The ACCC considers that an admission demonstrates recognition of wrongdoing or likely wrongdoing and is likely to reflect a business' increased willingness to take the necessary steps to address the concerning conduct and commitment to future compliance.
- a positive commitment to stop and not recommence the concerning conduct including by implementing practices and procedures (such as a compliance program with timeframes for implementation) aimed at preventing a recurrence of the conduct or other potential breaches of the CCA.
- details of the corrective action (advertising, notices or other communication) that will be taken by the business or individual to effectively alert and address the harm caused by the concerning conduct.
- details of redress including mechanisms to determine eligibility, calculate, monitor and resolve disputes for affected consumers or businesses. This may include refunds, voluntary recalls, community service remedies and industry-wide education programs funded by the business or individual providing the undertaking.
- a requirement to confirm compliance with the obligations of the undertaking by sending information or documents to the ACCC within specified timeframes.
- an acknowledgment that:
 - the ACCC will make the undertaking publicly available including by publishing it on the ['Section 87B undertakings register'](#)
 - the ACCC may make public reference to the undertaking, including reporting on compliance with the undertaking
 - the undertaking does not affect the rights and remedies available to any other person arising from the concerning conduct
 - the undertaking does not constitute a restriction on the ACCC.

In considering whether the duration of a proposed undertaking is acceptable, the ACCC may have regard to factors such as the extent of the conduct of concern, the steps required to remediate that conduct and any relevant market conditions.

Compliance programs

Undertakings often include the requirement for a business to implement a compliance program to assist them to comply with their ongoing obligations under the CCA.

The ACCC has developed a range of templates that outline what it considers an appropriate compliance program should contain for businesses of different sizes and risk levels. Guidance on the development and implementation of compliance programs, including templates of the 4 different levels of compliance programs, can be accessed through the ACCC website at '[Implementing a business compliance program](#)'. Compliance programs are a key tool to help with future competition and consumer law compliance.

Unacceptable terms

Undertakings will not be accepted by the ACCC if they include terms:

- denying the concerning conduct
- imposing obligations on the ACCC
- limiting the ACCC from instituting proceedings in the future
- stating 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)
- imposing obligations on third parties
- that may set up defences for possible non-compliance
- stating that the conduct was inadvertent or accidental
- that are self-serving statements seeking to minimise the consequences of the conduct for the business or individual including for public relations, reputational, or promotional purposes.

While there is no fixed form for an undertaking, the ACCC has developed a template with common terms of an undertaking (Attachment A). The terms of an undertaking will be tailored to the facts and circumstances of a particular matter.

What happens once an undertaking has been accepted?

As outlined in our [compliance and enforcement policy and priorities](#), transparency is a key principle and the ACCC's enforcement outcomes are made public. The ACCC will publish undertakings to be transparent about what enforcement action is taken and why. Publication promotes deterrence and educates consumers, other businesses and the public, contributing to consumer confidence and market integrity. All accepted undertakings are published on the '[Section 87B Undertakings Register](#)'. The ACCC may also refer to undertakings publicly, including in media releases, speeches and ACCC publications.

Where there is genuinely sensitive commercial or confidential information, it may be possible not to publish particular terms of an undertaking (for example, pricing data). If relevant, the business or individual offering the undertaking should raise any confidentiality concerns with ACCC staff when negotiating terms of an undertaking.

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 business or individual concerned. Some undertakings require the business or individual to engage an independent compliance professional to conduct reviews or audits.

To assist with monitoring compliance, undertakings often include requirements to submit information or documents to the ACCC, or for specific information to be maintained should the ACCC request it.

Variations or withdrawals

Undertakings may be varied or withdrawn with the consent of the ACCC. This allows changes to an undertaking if the business or individual finds, for example:

- the terms too difficult or impractical to comply with
- there have been material changes in the circumstances of a business or individual since the original undertaking was offered and accepted
- other exceptional circumstances apply.

The ACCC will consider reasonable requests for a variation or withdrawal of an undertaking if they do not alter the objectives and purpose of the original undertaking or there are exceptional circumstances to do so. Any request for a variation or withdrawal should be in writing, set out the reasons for the request and provide any supporting documentation.

Variations or withdrawals of undertakings are also published on the ACCC's [Section 87B Undertakings Register](#).

Breach of an undertaking

The ACCC takes non-compliance with the terms of an undertaking seriously and may take action to enforce them. Where the ACCC considers that a business or individual has not complied with an undertaking, it will generally first speak to the business or individual about its concerns.

The ACCC may also apply to the court for orders to remedy a breach of an undertaking. Section 87B of the CCA provides that the court, if it is satisfied that a person has breached a term of the undertaking, may make:

- an order directing compliance with the undertaking
- an order for the business or individual 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.

Attachment A - Template section 87B 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] [insert ACN or ABN] ([Company]), for the purposes of section 87B of the *Competition and Consumer Act 2010* (CCA) (Undertaking).

2. Background

2.1 [Description of Company's business and activities relevant to the ACCC's investigation]

3. ACCC Concerns

3.1 [Description of the concerning conduct and relevant period]

3.2 [Explanation of why the ACCC considers the conduct to contravene the CCA, Australian Consumer Law (ACL) contained in Schedule 2 of the CCA, a gas market instrument or relevant rules and/or relevant industry codes]

4. Admissions and Resolution

4.1 [Response from Company—for example:] As a result of the ACCC's investigation and in response to the ACCC's concerns, Company:

- (a) admits that its conduct contravened or was likely to contravene [relevant section of the CCA, ACL, gas market instrument, relevant rules and/or industry codes]
- (b) has ceased the [relevant] conduct
- (c) [if applicable, describe steps taken to remedy and mitigate any further conduct]
- (d) [if applicable] has cooperated with and assisted the ACCC during its investigation
- (e) has offered this Undertaking to the ACCC to address the ACCC's concerns.

4.2 [If applicable] [Company] has also paid [X] Infringement Notices, with a penalty of \$[X] [each (amounting to \$X in total)] issued by the ACCC under section [X] of the CCA for [X separate alleged contraventions of [provision of the CCA, ACL, gas market instrument, relevant rules and/or industry code] relating to the [conduct].

5. Commencement of this Undertaking

5.1 This Undertaking comes into effect when:

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

5.2 This Undertaking has effect for [duration of undertaking] years from the Commencement Date (the Term).

5.3 From the Commencement Date, [Company] undertakes to assume the obligations set out in paragraphs [X, Y and Z] of this Undertaking for the purposes of section 87B of the CCA.

6. Undertaking

6.1 [Company] undertakes that: [details of undertaking – for example, [Company]]:

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

Compliance Program

6.2 [Company] undertakes to, at its own expense:

- (a) establish and implement a Compliance Program (Compliance Program) in accordance with the requirements and timelines set out in “Annexure [X]”, being a program designed to minimise [Company]’s risk of future breaches of [the CCA, ACL, relevant rules and/or industry codes] and to ensure its awareness of the responsibilities and obligations in relation to the requirements of [the CCA, ACL, relevant rules and/or industry codes]
- (b) maintain and continue to implement the Compliance Program for the Term of this Undertaking.

7. Administration

7.1 The ACCC may authorise a member of the ACCC or an ACCC staff member to exercise a decision making function under this Undertaking on its behalf.

7.2 The ACCC may, from time to time, extend the date by which any of the obligations in this Undertaking is to be satisfied. Such a request for an extension must be express and in writing.

7.3 Information and documents required under this Undertaking will be provided via the ACCC’s Undertakings Portal whenever possible.

8. ACCC Enquiries

8.1 For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with [Company], and [Company] will, at its own expense, respond to such enquiries within a reasonable time.

8.2 If requested by the ACCC during the Term of this Undertaking, [Company] will, at its own expense, cause to be produced and provide to the ACCC copies of such documents (excluding legally privileged documents) in its power, possession or control evidencing [Company]’s compliance with the obligations set out in this Undertaking.

9. Acknowledgments

9.1 [Company] acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the [Section 87B Undertakings Register](#) on the ACCC’s 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) the ACCC may, from time to time, publicly report on compliance with this Undertaking
- (d) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

9.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the ACL and the CCA for penalties or other remedies in the event [Company] does not fully implement and/or perform its obligations under this Undertaking or in relation to any other event.

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

[Insert as applicable Chair/Deputy Chair]

Date

Attachment B - Text of section 87B of the *Competition and Consumer Act 2010*

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), a gas market instrument or the consumer data rules.
- (1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a merger authorisation.
- (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.

