



Compliance and Enforcement

Enforceable Undertakings

What is an enforceable undertaking?

An industrial inspector may accept a written undertaking from a person, called an 'enforceable undertaking', if the inspector reasonably believes the person has contravened an entitlement provision or civil penalty provision under the *Industrial Relations Act 1979*. In most cases, the person giving the undertaking will be an employer.

An enforceable undertaking is an acknowledgment that the person has committed a contravention and is a legally binding agreement. It will generally require the person to remedy the effects of the contravention and take proactive steps to ensure future compliance.

Examples of contraventions that may be dealt with by an enforceable undertaking include where an employer fails to:

- pay an employee their correct wages or other entitlements under an award or industrial agreement;
- comply with the *Minimum Conditions of Employment Act 1993*, including minimum wages and leave conditions;
- provide an employee with their correct long service leave entitlement under the *Long Service Leave Act 1958*; and
- make and keep required employment records.

When can an inspector accept an enforceable undertaking?

An industrial inspector can only accept an enforceable undertaking if they reasonably believe a person has committed a contravention of an entitlement provision or civil penalty provision. For example, an inspector could form this belief after inspecting the employment records of an employer, or after investigating a complaint from an employee.

An industrial inspector will consider a number of public interest factors when deciding whether to accept an enforceable undertaking from a person, including:

- whether the enforceable undertaking will provide a timely and efficient resolution that will fully address the effects of the contravention;
- the seriousness of the contravention (e.g. was the contravention deliberate, inadvertent or negligent);
- the person's compliance history, and the prospects of the person being sufficiently deterred from future contravening;
- whether the person has been non-compliant with other related laws (e.g. migration laws, superannuation laws, work health and safety laws); and
- the level of public concern with the contravention in question.

What is included in an enforceable undertaking?

An enforceable undertaking given by a person will include:

- an acknowledgement they have contravened an entitlement provision or civil penalty provision;
- specified actions to rectify the contravention (e.g. contacting affected employees and notifying them of the contravention; rectifying underpayments within a specified timeframe; paying superannuation on any back payments); and
- agreed actions to ensure they do not contravene the provision in the future (e.g. engaging an independent auditor to assess employment records and providing the audit results to an industrial inspector; organising appropriate training for staff on their employment obligations).

What happens if an enforceable undertaking is contravened?

If a person contravenes a term of an enforceable undertaking, an industrial inspector may apply to the Industrial Magistrates Court to enforce the term. The Court may make a variety of orders, including that the person comply with the term and pay compensation for loss suffered because of the contravention.

The inspector may also seek an order from the Court cancelling the enforceable undertaking, which would then enable enforcement proceedings to be taken against the person under section 83 or 83E of the *Industrial Relations Act 1979*. The maximum penalty that can be imposed by the Court under these sections for each contravention is:

- \$65,000 for a body corporate (\$650,000 if the contravention is a serious contravention); and
- \$13,000 for an individual (\$130,000 if the contravention is a serious contravention).

Varying or withdrawing an enforceable undertaking

A person who has given an enforceable undertaking may seek to vary or withdraw the undertaking at any time. This may occur, for example, because the person is no longer able to comply with a particular term of the undertaking. Any such variation or withdrawal requires the consent of an industrial inspector. Whether or not consent is given will depend on the circumstances of the case.

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