Enforceable undertakings

Guidelines for the Use of Enforceable Undertakings – Telecommunications Obligations
INTRODUCTION
The Australian Communications and Media Authority (ACMA) can accept enforceable undertakings about matters concerning compliance with the *Telecommunications Act 1997* (the Telecommunications Act) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act).

ACMA may accept undertakings that a person will take specified action or refrain from taking specified action to comply with the Telecommunications Act or the TCPSS Act, or take action directed towards avoiding contravention in the future. These undertakings are enforceable by the Federal Court.

About these guidelines
These guidelines provide:
- guidance on the circumstances under which ACMA will accept enforceable undertakings about telecommunications matters;
- examples of undertakings that may be accepted, and terms that are likely to be unacceptable;
- an explanation of the options available to ACMA if enforceable undertakings are not complied with; and
- information about varying, withdrawing and cancelling enforceable undertakings.

BACKGROUND
ACMA’s power to accept enforceable undertakings about telecommunications was introduced into the Telecommunications Act on 23 September 2005 by the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*. The power is set out in Part 31A of the Telecommunications Act. Section 572B sets out matters (including the undertakings) that may be accepted. Section 572C sets out the circumstances under which ACMA may apply to the Federal Court for enforcement, and the orders that may be made. Section 572B is in the following terms:

Acceptance of undertakings
(1) The ACMA may accept any of the following undertakings:
   (a) a written undertaking given by a person that the person will, in order to comply with this Act, take specified action;
   (b) a written undertaking given by a person that the person will, in order to comply with this Act, refrain from taking specified action;
   (c) a written undertaking given by a person that the person will take specified action directed towards ensuring that the person does not contravene this Act, or is unlikely to contravene this Act, in the future.
(2) The undertaking must be expressed to be an undertaking under this section.
(3) The person may withdraw or vary the undertaking at any time, but only with the consent of the ACMA.
(4) The ACMA may, by written notice given to the person, cancel the undertaking.
(5) The ACMA may publish the undertaking on its Internet site.
(6) In this section:
   "this Act" includes the Telecommunications (Consumer Protection and Service Standards) Act 1999.
This power is similar to the powers enjoyed by the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority to accept enforceable undertakings.

ACMA also has the power to accept enforceable undertakings to prevent spam under the Spam Act 2003, although that framework is slightly different. Accordingly, these guidelines do not apply to the acceptance of enforceable undertakings under the Spam Act 2003.

An undertaking is a formal promise to act or refrain from acting in a particular manner. Enforceable undertakings for the purposes of the Telecommunications Act are a person’s written promise expressed to be undertakings under section 572B of the Telecommunications Act which are accepted by ACMA. Practically, they are included in a document signed by both parties which can be used by ACMA as the basis for seeking a court order without ACMA having to establish, in Court, a contravention of the relevant Act. This is a simpler and more cost effective procedure than contested enforcement litigation.

Enforceable undertakings can be cancelled by ACMA, or withdrawn or varied by the undertaking party with ACMA’s consent.

Unless exceptional circumstances are accepted by ACMA as applying, ACMA will publish enforceable undertakings on its internet site.

**The advantages of enforceable undertakings**

Enforceable undertakings are both a flexible and efficient regulatory tool. In his report for the Australian Broadcasting Authority *Reform of the broadcasting regulator’s enforcement powers*, Professor Ian Ramsay noted that the advantages of enforceable undertakings include that they:

- save time, and the financial costs and court resources required for litigation;
- allow compromise—both parties can contribute to structuring the compliance action;
- allow flexibility and the opportunity for behavioural change;
- encourage learning; and
- ensure that the regulated entity’s process of compliance is ongoing (for example, compared to a one-off fine).

Enforceable undertakings are a flexible tool in that they can enable past misconduct to be rectified and shape future behaviour, including establishing preventative measures where there is a risk of breach rather than an actual breach.

Compared with other enforcement action, enforceable undertakings can be more efficient insofar as they are focussed upon the particular circumstances of the person giving the undertaking and can improve the likelihood of compliance.

Insofar as enforceable undertakings are aimed at encouraging behavioural change in an organisation (such as by introducing compliance structures and processes) they are able to address systemic problems rather than isolated instances of non-compliance or misconduct. The advantage of this approach is that the undertaking party takes responsibility for its own organisational and behavioural change.
Where ACMA publishes enforceable undertakings on its internet site, associated publicity may have an educative effect in advising market participants about expected standards of regulatory compliance.

The Telecommunications Act does not prescribe the scope of undertakings that may be accepted or the way in which the obligations are structured. For example, enforceable undertakings could include a flexible compliance plan with improvements over a number of stages.

Enforceable undertakings may include a requirement that the undertaking party report to ACMA on a regular basis so that the effectiveness of the undertakings can be assessed. Undertakings could then be varied or withdrawn by the undertaking party (with effective oversight by ACMA through the requirement that ACMA’s consent be obtained) or could be cancelled by ACMA where the undertakings are no longer considered relevant or effective.

Principles governing the use of enforceable undertakings
ACMA will use its power to accept enforceable undertakings consistent with the following principles:

- An enforceable undertaking will be available as part of a suite of regulatory options, but will not be used where other regulatory action is more appropriate;
- The terms of an enforceable undertaking should:
  - establish a relationship between the specified action and the contravention of the Telecommunications Act and the TCPSS Act;
  - be proportionate to the impact of the breach or risk of future breach;
  - be readily understood;
  - be capable of implementation;
  - include action which is capable of being measured or tested objectively; and
  - include a compliance monitoring and reporting framework.
- ACMA will not accept an enforceable undertaking in which the regulated entity seeks:
  - to deny liability;
  - to impose terms or conditions on ACMA, including a specific requirement that ACMA will not in future institute proceedings in the particular matter;
  - a statement that the undertaking is not an admission regarding action by third parties such as employees; or
  - to establish defences for possible non-compliance.

USING ENFORCEABLE UNDERTAKINGS
Broadly speaking, a suite of regulatory measures is available to ACMA. The acceptance of enforceable undertakings could be used as an alternative to, or in addition to, the exercise of other enforcement powers. ACMA seeks to use the minimum power or intervention necessary to achieve a sustained and ongoing commitment to compliance.
from regulated entities. These regulatory measures include in broadly increasing impact of intervention:

- advice and encouragement;
- formal warnings;
- enforceable undertakings;
- infringement notices;
- remedial directions or notices to comply;
- cancellation and suspension of licences; and
- court action, and civil and criminal penalties.

**When and how might enforceable undertakings be accepted?**

ACMA may accept enforceable undertakings at any time, including during or following an investigation of a breach or alleged breach of the Telecommunications Act or the TCPSS Act.

Enforceable undertakings only take effect when formally accepted by ACMA.

A person cannot compel ACMA to accept enforceable undertakings, nor can ACMA compel a person to offer enforceable undertakings.

Each offer of enforceable undertakings will be assessed on its own merits. An undertaking needs to be focussed on ensuring that the action specified is directed towards ensuring that the undertaking party does not contravene the Telecommunications Act or the TCPSS Act.

Factors that ACMA may consider in deciding whether to accept an undertaking include the likelihood that the person will comply with the undertakings (for example, this may be assessed by reference to ACMA’s prior dealings with the person) and the likely time within which the person is expected to rectify their behaviour.

**Content of enforceable undertakings**

Enforceable undertakings about telecommunications obligations may be accepted by ACMA to secure commitment from the undertaking party about improving corporate behaviour and migrating to a compliance culture, as well as rectifying more objective breaches of the Telecommunications Act or the TCPSS Act.

The Telecommunications Act and the TCPSS Act impose obligations in relation to the following areas of the telecommunications industry. Enforceable undertakings may be accepted to remedy or prevent breaches of obligations in many areas, among which are:

- technical regulations;
- cabling regulations;
- telecommunications numbering;
- premium rate services;
- number portability;
- pre-selection;
- carrier licensing;
- telecommunications infrastructure regulations;
- national interest issues related to telecommunications;
- law enforcement related to telecommunications;
- emergency call service management; and
- service provision safeguards.

Where a breach or alleged breach of the Telecommunications Act or TCPSS Act has been identified, ACMA will only accept enforceable undertakings that include a positive commitment to stop and not recommence particular conduct. Where the breach has caused financial loss or harm to a third party, ACMA may accept an undertaking in which the undertaking party offers redress to a third party.

Wherever possible, enforceable undertakings should provide certainty by including a time period within which compliance with the undertaking is required and not be otherwise open ended.

ACMA will generally prefer enforceable undertakings where the extent of compliance is transparent and can be independently tested by other market participants. This may include a compliance plan to prevent future breaches, including requirements for:

- the establishment of internal control and compliance programs targeted at correcting the type of conduct that caused the breach or risk of breach, including operating procedures and the designation of a compliance officer;
- the development and dissemination of a clear compliance policy to staff;
- compliance training programs for staff specifying learning techniques and practical matters including the number of occasions and period over which the training will be conducted; and
- the undertaking party to monitor and report to ACMA on its compliance at regular intervals for a set period.

**Publishing enforceable undertakings**

Unless exceptional circumstances are accepted by ACMA as applying, ACMA will publish enforceable undertakings on its internet site at [www.acma.gov.au](http://www.acma.gov.au). For example, ACMA may consider a request by the undertaking party that matters that are commercial-in-confidence or that disclose personal details of an individual not be published. ACMA may also consider whether disclosure is against the public interest.

**Varying, withdrawing or cancelling enforceable undertakings**

The undertaking party may request a variation to enforceable undertakings. In deciding whether to consent to a variation, ACMA may consider the effectiveness of the existing undertakings and whether the proposed variation alters the spirit of the original undertakings.

In considering a request by the undertaking party that undertakings be withdrawn, ACMA may consider whether the party has fully performed its obligations under the undertakings.

ACMA may also withdraw undertakings at the undertaking party’s request or cancel them if their requirements are found to be impractical or there has been a material change in the circumstances to which the undertakings relate.
Enforcement action if enforceable undertakings are breached
If ACMA considers that a person has breached enforceable undertakings it can apply to
the Federal Court for any of the following orders:

- an order directing compliance with the undertakings;
- where the person has obtained financial benefit as a result of a breach, an order to
  pay the Commonwealth an amount up to that financial benefit;
- where the breach has caused loss or damage to another person, an order directing
  that compensation be paid to that other person; or
- any other order that the Court considers appropriate.