Compliance policy for enforceable undertakings

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1. Introduction

The Clean Energy Regulator may accept an enforceable undertaking to improve and where necessary enforce compliance with the legislation it administers. This policy explains our approach to enforceable undertakings, including:

- the purpose and operation of an enforceable undertaking
- when we will consider accepting an undertaking
- what terms must be included in an undertaking, and
- how we monitor compliance with the undertaking.

This policy comes under our broader compliance framework and should be read in conjunction with its Compliance policy for education, monitoring and enforcement activities.

2. What is an enforceable undertaking?

Enforceable undertakings are voluntary written statements from the scheme participant that they will do, or refrain from doing, specified action to resolve non-compliance or improve compliance with the legislation administered by the Clean Energy Regulator.

Undertakings are designed to secure effective and efficient remedies to address non-compliance without the need for court proceedings, and to provide non-adversarial and constructive solutions to compliance issues. An undertaking may operate in conjunction with other regulatory actions taken by the Clean Energy Regulator.

2.1. Our role and responsibilities

An enforceable undertaking is one of a number of remedies available to the Clean Energy Regulator to address non-compliance. It is a regulatory option we may accept as an alternative to civil court action or other administrative action.

Undertakings are governed by the following legislation:

- Part 23 of the Carbon Credits (Carbon Farming Initiative) Act 2011 (CFI Act)
- Part 5, Division 3 of the National Greenhouse and Energy Reporting Act 2007 (NGER Act), and

Our power to accept enforceable undertakings enhances our ability to enforce compliance with the law. They are also an important tool in our suite of regulatory options to influence behaviour, encourage a culture of compliance and may also set out acceptable standards of practice to the broader industry.

2.2. How an undertaking works

An undertaking can be initiated by a scheme participant, or as a result of discussions between a scheme participant and the Clean Energy Regulator. Although binding, the participant’s undertaking must be
voluntary — we do not have the power to require a scheme participant to enter into an enforceable undertaking. A scheme participant cannot compel the Clean Energy Regulator to accept an undertaking. We will consider each case on its merits and acceptance of a particular undertaking should not be regarded as a binding precedent for future action.

An enforceable undertaking is different from an undertaking to a court (see Table 1).

Table 1: Differences between an undertaking to the Clean Energy Regulator and to a court

<table>
<thead>
<tr>
<th>Feature</th>
<th>Undertaking to the Clean Energy Regulator</th>
<th>Undertaking to a court</th>
</tr>
</thead>
<tbody>
<tr>
<td>When the undertaking can be accepted</td>
<td>Clean Energy Regulator does not have to start court action before it can accept an undertaking.</td>
<td>An undertaking may only be given when a court action has started.</td>
</tr>
<tr>
<td>What happens in the event of non-compliance with the undertaking</td>
<td>Clean Energy Regulator may apply to the court for appropriate orders if the undertaking is not complied with or take other regulatory actions.</td>
<td>A breach of the undertaking may itself be the subject of contempt proceedings (i.e. it may be enforced in the same way as an injunction).</td>
</tr>
</tbody>
</table>

3. **Entering into an undertaking**

A scheme participant wishing to enter into an undertaking should first discuss it with the regulatory officer assigned to their case. After the offer has been made and the terms of the undertaking are discussed, the decision to accept or reject the offer will be made by an authorised senior official of the Clean Energy Regulator.

In the course of drafting the undertaking, we will negotiate the terms with the scheme participant to arrive at an appropriate regulatory outcome. While an enforceable undertaking is negotiated between the Clean Energy Regulator and the scheme participant, it cannot be used as leverage by the scheme participant to obtain a more favourable outcome or less punitive enforcement action taken by us. Acceptance of an undertaking in a particular set of circumstances cannot be regarded as a binding precedent for future action — each instance of non-compliance is addressed on a case-by-case basis.

The undertaking will take effect when both parties have signed it.

3.1. **When is an enforceable undertaking an appropriate remedy?**

When deciding whether an undertaking is appropriate in the circumstances of the case, the Clean Energy Regulator will consider the following factors (note, this list is not exhaustive):

- the impact of the non-compliance on the objectives of the relevant scheme
- the compliance history of the scheme participant
- the culpability of the actions of the scheme participant in relation to the non-compliance
- the extent to which the scheme participant is genuinely solving the problem
- whether the scheme participant is making a full commitment to ongoing compliance
whether the problem has stopped
whether the agreed outcome would parallel the orders the Clean Energy Regulator would seek if enforcement in a court was sought, and
the ability of the Clean Energy Regulator to properly monitor compliance with the undertaking.
Where the non-compliance was intentional, criminal or fraud was committed, we are likely to take stronger compliance action rather than entering into an enforceable undertaking.

3.2. Examples of undertakings we may accept
The table below illustrate the kinds of undertakings we may accept. These are not exhaustive, and every undertaking is tailored to the particular circumstances of a matter.

Table 2: Examples of enforceable undertakings

<table>
<thead>
<tr>
<th>REE Act</th>
<th>The scheme participant improperly created small-scale technology certificates (STCs) that did not comply with regulation 20AC of the REE Regulations nor with section 24A of the REE Act. The scheme participant undertakes to develop and implement increased compliance procedures prior to any STC creation, rectify all existing non-compliance, comply with all requirements under the Act and the Regulations and report monthly to the Clean Energy Regulator on rectification work including evidence of work undertaken in accordance with the timeframes set out in the undertaking.</th>
</tr>
</thead>
<tbody>
<tr>
<td>REE Act</td>
<td>The scheme participant undertakes to arrange for an accredited installer to re-inspect the solar PV systems identified by the Clean Energy Regulator, to ensure they comply with Clean Energy Council guidelines and all state and local requirements.</td>
</tr>
<tr>
<td>CFI Act</td>
<td>The scheme participant undertakes to obtain and resubmit to the Clean Energy Regulator correct eligible interest holder consent forms for the relevant projects and review internal records management procedures.</td>
</tr>
<tr>
<td>NGER Act</td>
<td>The scheme participant undertakes to submit and complete a schedule of technical works to resolve the issues regarding measurements of flow and concentration which resulted in reporting that was non-compliant.</td>
</tr>
</tbody>
</table>

4. General form and content of undertakings

4.1. What terms must be included in an undertaking
The Clean Energy Regulator will only accept an enforceable undertaking if the scheme participant makes a commitment to stop the conduct or non-compliance in question, and not recommence it.

Undertakings must:

- state the name of the scheme participant and the date that the Clean Energy Regulator accepted the undertaking/s
• directly address the non-compliance and specify the action or inaction that has given rise to the non-compliance (or prospective non-compliance)

• set out future actions by the scheme participant to prevent an occurrence or reoccurrence of the non-compliance, ensuring these are both unequivocal and assessable

• where relevant, rectify any damage or negligence caused by the non-compliance

• ensure timeframes for completing specific undertakings fit within the duration of the undertaking agreed between the parties

• include mechanisms to satisfy the Clean Energy Regulator that the undertaking will be complied with (e.g. monitoring and reporting mechanisms, external assessment of the changes that are put in place, etc.), and

• be signed by the scheme participant (e.g. company director) and accepted by the Clean Energy Regulator.

4.2. Publicity and public access to enforceable undertakings

Under the CFI Act and REE Act, the Clean Energy Regulator is legally obliged to publish the undertaking on its website while under the NGER Act we may publish the undertaking. We will not enter into an enforceable undertaking on the basis that its terms or parties will be confidential and will make the whole enforceable undertaking available for public inspection.

We believe there is significant public interest in ensuring scheme participants are aware of, and informed about, enforcement action that we take since such transparency educates scheme participants of their obligations and promotes deterrence.

4.3. Variation of an undertaking

A scheme participant cannot withdraw or vary an undertaking without the Clean Energy Regulator’s consent.

We will only consider a request to vary an enforceable undertaking if:

• the variation will not alter the spirit of the original undertaking

• compliance with the original undertaking is subsequently found to be impractical, or

• there has been a material change in the circumstances which led to the original undertaking being given.

5. Monitoring compliance with the terms of the undertaking

Monitoring compliance with undertakings is central to the credibility of them. Depending on the undertaking requirements, scheme participants should expect to monitor and report to the Clean Energy Regulator on compliance with it. The scheme participant must proactively provide us with timely updates on the progress of the undertaking in line with the requirements of it.

Monitoring and reporting will usually occur through a compliance monitoring plan as part of the undertaking and may include the provision of evidence of implementation and independent compliance reports being provided to the Clean Energy Regulator.
5.1. What happens when the undertaking has been complied with?

When the Clean Energy Regulator is satisfied that all the elements of the undertaking are complete, a letter will be sent to the scheme participant advising that the undertaking has been completed and the public register of undertakings has been updated.

We expect the scheme participant to maintain high levels of compliance once an undertaking is completed. Scheme participants can expect us to take stronger regulatory action in line with our Compliance policy for education, monitoring and enforcement activities if further non-compliance occurs.

5.2. What happens if an enforceable undertaking is not complied with?

If the Clean Energy Regulator has reason to believe a scheme participant has not complied with a term of an enforceable undertaking, depending on the circumstances and our concerns we will contact the participant to understand why the undertaking is not being complied with.

Following this, we may undertake further regulatory actions including, but not limited to, applying to the court to enforce the undertaking and make any other appropriate order. We may also increase scrutiny of applications for benefits (e.g. small-scale technology certificates, large-scale generation certificates, Australian carbon credit units), suspension, removal from scheme, civil or criminal prosecution. Typically, court action will be pursued where the breach is significant, or involves a failure to perform an obligation by a certain time.

The court can:

- direct the person to comply with the undertaking
- direct the person to transfer money (up to the amount of any financial benefit that is directly or indirectly obtained and reasonably attributable to the breach) to the Clean Energy Regulator
- direct the person to compensate any other person who has suffered loss or damage as a result of the breach, or
- make any other order that the court considers appropriate.

If the scheme participant does not comply with the court order they will be in contempt of court.

6. Policy review

The Clean Energy Regulator is committed to administering the climate change laws in a transparent, ethical and accountable manner. As part of this, we regularly review the content and implementation of this policy to ensure all relevant operational experience and legislative amendments are incorporated.

Where amendments to this policy are required, the updated policy can be found on our website.

7. Further information

Any queries regarding enforceable undertakings can be directed to enquiries@cleanenergyregulator.gov.au or 1300 553 542.

Any suggestions about our compliance approach can also be provided at the above email address.