

# Enforceable Undertakings Guidelines

*November 2023*

**Published by the Department of Regional NSW**

Title: Enforceable Undertakings Guidelines

First published: February 2017

Department reference number: PUB17/121/DOI

Amendment schedule		
Date	Version	Amendment
February 2017	1	
June 2017	2	Update EU publication timeframes and reference to Department name
July 2017	3	Updated design
June 2018	4	Update Appendix A – WHS Act and Appendix B – Mining Act
August 2019	5	Update template
March 2020	6	Update publication of rejected enforceable undertaking information
August 2020	7	Update name of department and include statement about partnering with third parties
November 2023	8	Update name of department, contact details for enquiries, remove reference to negotiations being “without prejudice”

© State of New South Wales through Regional NSW [insert year]. You may copy, distribute, display, download and otherwise freely deal with this publication for any purpose, provided that you attribute the Regional NSW as the owner. However, you must obtain permission if you wish to charge others for access to the publication (other than at cost); include the publication in advertising or a product for sale; modify the publication; or republish the publication on a website. You may freely link to the publication on a departmental website.

Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing ([Month YYYY]) and may not be accurate, current or complete. The State of New South Wales (including the Regional NSW), the author and the publisher take no responsibility, and will accept no liability, for the accuracy, currency, reliability or correctness of any information included in the document (including material provided by third parties). Readers should make their own inquiries and rely on their own advice when making decisions related to material contained in this publication.

# Table of Contents

Introduction.....	4
The NSW Resources Regulator .....	4
The Environment Protection Authority.....	4
Enforceable undertakings.....	4
The benefits .....	5
When it is considered .....	5
Proposing an enforceable undertaking .....	6
Undertaking templates.....	6
Pre-proposal advisory service .....	6
Timeframes .....	7
Contents of the undertaking.....	7
Reviewing the proposal .....	8
Review .....	8
Negotiation of terms.....	8
Finalising the proposal.....	8
Publication of enforceable undertakings .....	8
Failure to comply with an enforceable undertaking.....	9
Varying or withdrawing an enforceable undertakings .....	10
Completing an enforceable undertaking .....	10
About this guidance document.....	10
Further information .....	11
Appendix A: WHS Act undertaking proposal requirements .....	12
Section A: general information .....	12
Section B – enforceable terms .....	16
General matters .....	17
Appendix B: Mining Act undertaking requirements.....	18
Section A: general information .....	18
Section B: enforceable terms.....	19
General matters.....	20

# Introduction

This document is a guide to proposing an enforceable undertaking to the NSW Resources Regulator within the Department of Regional NSW in relation to the:

- *Work Health and Safety Act 2011* (the WHS Act) (Part 11)
- *Mining Act 1992* (the Mining Act) (Division 4B of Part 17A)
- *Petroleum (Onshore) Act 1991* (the Petroleum (Onshore) Act) (Division 6 of Part 13A).

Within this document, these pieces of legislation may be referred to as the Act/s.

These guidelines discuss the purposes of enforceable undertakings, the factors that will be taken into account in deciding whether to accept an enforceable undertaking, and the possible terms of any negotiated enforceable undertakings. These guidelines should be read in conjunction with our [Compliance and Enforcement Approach](#) which outlines the aims of compliance and enforcement, as well as the tools available to us.

## The NSW Resources Regulator

We are responsible for compliance and enforcement functions across the mining and energy sectors. This includes undertaking a range of activities to ensure duty holders maximise compliance with resources and safety legislation.

## The Environment Protection Authority

The NSW Environment Protection Authority (EPA) is the primary environmental regulator for NSW. The EPA is also the lead regulator for all onshore petroleum exploration and production activities and is responsible for all compliance and enforcement activities under the Petroleum (Onshore) Act 1991 (the Petroleum (Onshore) Act), with the exception of work, health and safety (WHS) issues.

The EPA can accept enforceable undertakings under clause 4 of Schedule 2A of the Protection of the Environment Operations Act 1997 to address alleged non-compliance with petroleum requirements and title conditions (excluding WHS matters).

As lead regulator, any enforceable undertaking relating to the EPA's responsibilities under the Petroleum (Onshore) Act will be considered and determined by the EPA in accordance with its policies and processes.

The EPA's guidelines and forms relating to its acceptance of enforceable undertakings are available on the EPA's website.

## Enforceable undertakings

An enforceable undertaking is a written, legally binding agreement proposed by a company or individual following an alleged contravention of an Act. It provides a commitment by a company or individual to implement initiatives designed to deliver tangible benefits for the industry and broader community.

These initiatives should seek to resolve both the behaviour of concern that has led to the alleged contravention and also seek to rectify the consequences of the conduct.

Note: For the purposes of this guideline, WHS undertakings made under the WHS Act and enforceable undertakings made under the Mining Act are both referred to as ‘enforceable undertakings’ or simply as ‘undertakings’ unless specifically referring to WHS undertakings.

The proposal of an enforceable undertaking is not an admission of guilt by the company or individual giving the undertaking and the undertaking may be accepted by the Regulator as an alternative to prosecution. Once accepted, the company or individual is obligated to carry out the specific activities outlined in the undertaking. Undertakings are published and form part of the compliance history of a company or individual.

## The benefits

Enforceable undertakings allow the company or individual to acknowledge issues identified in relation to an alleged contravention. These undertakings provide an opportunity to arrive at a mutually agreed resolution to compliance matters where an infringement or prosecution may not be appropriate or achieve the desired outcomes, be counter-productive or may not be in the best interests of the public.

An enforceable undertaking promotes the objects and purpose of the Acts and brings benefits to workers, the industry and the community through:

- provision of additional facilities or resources to the community and or industry
- significant and ongoing commitments aimed at achieving improved compliance outcomes beyond what might be able to be achieved by progressing legal proceedings
- improved community consultation
- better environmental practices
- deterrent effects similar to a successful legal proceeding
- a more timely resolution to compliance issues with reduced costs to the Regulator and the taxpayer
- opportunities for the company or individual to communicate to their industry peers and the community generally about the consequences of the alleged contravention and the opportunities improved overall compliance can bring.

## When it is considered

Enforceable undertaking proposals will be considered if it can be demonstrated to be the most effective and appropriate regulatory outcome in the circumstances, with regard to:

- the nature of the alleged contravention
- any impacts of the alleged contravention on any worker, the industry, the community or the environment
- the compliance history of the company or individual involved.

Prosecution proceedings or other enforcement action does not need to have commenced in order for consideration to be given to an enforceable undertaking proposal. If a prosecution has not been

commenced and an enforceable undertaking is accepted, prosecution proceedings will not be commenced (subject to the company or individual complying with their obligations under the enforceable undertaking). If a prosecution has commenced, all reasonable steps will be taken to discontinue the proceedings as soon as possible after the enforceable undertaking has been accepted.

When making a decision whether to accept or reject an enforceable undertaking, consideration will be given to the nature of the alleged contravention. The effectiveness of the enforceable undertaking as a regulatory outcome compared with other available enforcement measures will also be taken into account. Several factors will be considered when making this assessment, including the:

- situation of workers, community members or others whose interests have been, or may be impacted by the conduct
- impact on the environment and the ability to rectify or reduce this through an undertaking
- likely impact on the company's or individual's future conduct
- likely impact on other members of the industry
- community interest in quick and cost-effective regulatory outcomes
- company's or individual's compliance history.

All proposals are considered on a case-by-case basis and a decision to accept or reject an enforceable undertaking in a particular set of circumstances will not be regarded as a binding precedent for future action.

## Proposing an enforceable undertaking

### Undertaking templates

Templates for WHS Act and Mining Act enforceable undertakings are available from the Regulator. It is recommended that proponents use these templates when preparing an enforceable undertaking for submission. Use of these templates ensures the information and commitments required, as set out in appendices A and B, are provided in a clear and easy-to-understand manner.

The EPA requires proponents to submit an application form when proposing an enforceable undertaking for petroleum matters. It is available on the EPA's website.

To obtain templates for an enforceable undertaking contact the relevant agency listed in Finding out more about enforceable undertakings.

### Pre-proposal advisory service

Before proposing an enforceable undertaking under the Mining Act or WHS Act, it is recommended that a company or individual use the pre-proposal advisory service provided by the Regulator. This service aims to explain the proposal submission process, the factors that are considered when evaluating the proposal and the negotiation and acceptance process that will be followed.

Where possible, these services are provided through face-to-face meetings.

This service is aimed at giving sufficient information to allow a company or individual to determine if proposing an enforceable undertaking is the most appropriate path to take. The service will also outline the scope of activities likely to be required within the proposed undertaking for it to be considered. The company or individual may also wish to obtain legal advice.

Any assistance provided should not be seen as a guarantee that the proposal will be accepted if the advice is followed.

Contact details for this service are provided at the end of this document.

## Timeframes

A company or individual considering an enforceable undertaking must negotiate a timeframe for the submission of the proposal. Early agreement on acceptable timeframes is essential to ensure a timely consideration of the proposal. An enforceable undertaking proposal may be refused if there was unreasonable delay in proposing it.

Investigations and legal proceedings will continue until a proposed enforceable undertaking is accepted.

## Contents of the undertaking

The specific terms to be included in an enforceable undertaking will vary depending on the nature of the alleged contravention and the actions that are proposed to remedy the matter. In general terms, the enforceable undertaking must include:

- particulars about the company or individual proposing the undertaking
- details of the alleged contravention
- an acknowledgement of:
  - the allegation that a contravention has occurred
  - any defective conduct that lead to the alleged contravention
  - the seriousness of alleged contraventions including any harms (including potential harms) that may have resulted
- the terms of the proposed undertaking.

An enforceable undertaking may also be required to include a commitment regarding reimbursement of the Regulator's reasonable costs in accepting such an undertaking including the costs involved in investigating the original offence, reviewing the proposal and monitoring compliance with the undertaking over the time during which it is in force.

An undertaking cannot include:

- any denial of liability
- terms that set up defences for possible non-compliance with the undertaking
- terms that may impose an obligation on the Regulator or any other person or individual without the person or individual's consent
- any terms that may set up defences for possible future contraventions of the Act

- terms that require the agreement of a third party, unless that agreement is confirmed in writing as part of the proposal
- submissions on why prosecution or other enforcement action should not be commenced or why the undertaking should be accepted (these can be dealt with by way of a cover submission).

Enforceable undertaking requirements are included as appendices to this document:

- [Appendix A - WHS Act](#)
- [Appendix B - Mining Act](#)

For details of what is required in an enforceable undertaking administered by the EPA, please read the EPA's relevant guidelines and forms on the EPA's website.

## Reviewing the proposal

Each proposal for an enforceable undertaking will be considered on a case-by-case basis.

### Review

We will conduct a review of the proposal when received (proposals under the Petroleum Onshore Act need to be submitted to the EPA in accordance with its processes and it will be considered by the EPA). Expert independent advice may be sought during this process. The assessment takes into account the nature of the alleged contravention and the appropriateness of the action proposed by the company or individual.

The review process seeks to determine whether the enforceable undertaking is an appropriate regulatory response with regard to the specific circumstances.

### Negotiation of terms

If necessary, negotiations with the company or individual proposing the enforceable undertaking will be conducted regarding the inclusion of specific terms.

## Finalising the proposal

Written notice of the decision to accept or reject the enforceable undertaking will be given to the company or individual submitting the enforceable undertaking proposal. The written notice will include reasons for the decision.

An enforceable undertaking will not take effect until it is accepted and signed by the Secretary of the department or their delegate and the outcome of the decision is communicated to the company or individual who proposed the undertaking. A later date for commencement may be specified, if necessary.

### Publication of enforceable undertakings

When an enforceable undertaking is accepted or rejected, notice of the decision and reasons for that decision will be made public.

The terms of enforceable undertakings are a matter of public record and details of all enforceable undertakings that have been accepted or rejected will be published. We will publish any decision to accept or reject an undertaking and the reasons for that decision on its website within 14 days of the date of the decision.

Enforceable undertakings will not be accepted in confidence. However, certain information in an enforceable undertaking will not be made publicly available if the company or individual requests that such information not be released, and the Regulator is satisfied that it:

- is commercial in confidence and/or
- contains personal details of an individual.

If a copy of an enforceable undertaking is made publicly available with such confidential information deleted, the published copy will include a note stating that certain information has been redacted.

## Failure to comply with an enforceable undertaking

Compliance with the terms of an enforceable undertaking will be strictly monitored by the Regulator.

An enforceable undertaking is a legally binding agreement and non-compliance is subject to strict penalties. Contravening an enforceable undertaking is considered a very serious offence and the Regulator will take enforcement action and pursue any material contraventions of the undertaking.

The maximum penalties for contravening enforceable undertakings are listed below.



### Mining Act

Corporate \$1.1 million	Individual \$220,000
----------------------------	-------------------------



### Work Health and Safety Act

Corporate \$250,000	Individual \$50,000
------------------------	------------------------

There are several approaches that can be taken in such circumstances, depending on the legislation to which the enforceable undertaking relates. For example, an application may be made to the District Court for an order:

- directing the company or individual to comply with the undertaking
- to discharge (i.e. cancel or set aside) the undertaking
- imposing a penalty on the company or individual for not complying with the undertaking
- directing the company or individual to pay the Regulator’s legal costs related to pursuing the matter.

If the undertaking is discharged by the court, the Regulator maintains the right to issue infringement notices or commence prosecution in relation to the original alleged contravention.

## Varying or withdrawing an enforceable undertakings

A company or individual may apply to withdraw or vary an enforceable undertaking. Requests to vary an enforceable undertaking will only be considered if:

- it does not alter the spirit of the original undertaking
- compliance with the original undertaking is subsequently found to be impractical
- there has been a material change in circumstances.

An undertaking will not be varied to provide for another, separate contravention of a relevant Act.

Variations or withdrawals of an enforceable undertaking will only take effect when authorised and signed by the Secretary or delegate.

Withdrawals of, and variations to, enforceable undertakings will be published. Enforceable undertakings will not be removed from the public register and will remain on the register after a company or individual has discharged all obligations of the undertaking.

## Completing an enforceable undertaking

Once an enforceable undertaking has been fully carried out by the company or individual the Secretary or delegate will review compliance reporting provided by the proponent and other relevant information. If all commitments and undertakings have been materially completed a letter informing the company or individual of the finalisation of the enforceable undertaking will be issued.

## About this guidance document

### Definitions

The following terms are used within this document.

- Category 1 offence: under the WHS Act a person commits a Category 1 offence if:
  - the person has a health and safety duty; and
  - the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
  - the person is reckless as to the risk to an individual of death or serious injury or illness.
- Department: Regional NSW
- EPA: the NSW Environment Protection Authority
- Person: the duty holder or person who proposes an undertaking and against whom the undertaking becomes enforceable if it is accepted. The term includes a reference to a body corporate, the Crown and a public authority as well as an individual
- Secretary: the Secretary of Regional NSW, or their delegate
- SMS: a safety management system

- Term of an undertaking: the fixed period of time during which the undertaking is in effect. All enforceable terms must be completed within the term of an undertaking.

## Further information

For WHS Act and Mining Act undertakings:

NSW Resources Regulator **1300 814 609** or for media enquiries only **(02) 9995 6415**

For further information email [nswresourcesregulator@services-now.com](mailto:nswresourcesregulator@services-now.com)

Please include “Safety” or “Mining Act” in the subject field to help us direct your inquiry to the correct team.

For Petroleum Onshore Act undertakings:

NSW Environment Protection Authority **131 555**

[gas.reg@epa.nsw.gov.au](mailto:gas.reg@epa.nsw.gov.au)

[epa.nsw.gov.au](http://epa.nsw.gov.au)

# Appendix A: WHS Act undertaking proposal requirements

Note: A template is available to assist proponents in preparing a WHS undertaking. Please contact the NSW Resources Regulator on 1300 814 609 to obtain the template or for further information.

Note: WHS undertakings cannot be considered for Category 1 offences.

## Section A: general information

### 1. Details of the company or individual proposing the WHS undertaking

This section must include the following information about the company or individual proposing the WHS undertaking:

- contact details
- the type of legal structure (e.g. whether the person is a natural person, sole trader, partnership, body corporate or government agency)
- the type of business conducted (e.g. underground coal mine, open cut gold mine, basalt quarry, engineering firm, original equipment manufacturer)
- commencement date of the entity
- number of full and part-time workers
- description of the products or services.

### 2. Details of the alleged contravention

Outline details of the alleged contravention (if a 'Complaint and Summons' has been received then this information can be found on these documents).

### 3. Details of the event surrounding the alleged contravention

Describe the factual details of the incident in one to two paragraphs.

This should not include individuals' names or gender but instead use suitable terms that best describe the person's relationship to the incident such as the injured worker, a member of the public, the site or workshop supervisor. Avoid giving opinion on how the incident occurred.

### 4. An acknowledgement that the Regulator has alleged a contravention has occurred

The undertaking must acknowledge that the Regulator alleges a contravention has occurred. For example: 'It is acknowledged that the Regulator has alleged [the entity or the individual] has contravened provisions of the Work Health and Safety Act 2011'.

### 5. The details of any injury or harm that arose from the alleged contravention

Specify what injuries or harm occurred as a result of the alleged contravention.

### 6. The details of any notices issued that relate to the alleged contravention

Include details of any notices issued in relation to the alleged contravention and the actions taken in response to those notices.

7. A statement of assurance about future work health and safety behaviour

Make a statement that gives an assurance about future health and safety behaviour. The terms of the undertaking will provide further illustration of this assurance.

8. When an alleged contravention is associated with an injury/illness

- a) The details of the type of workers' compensation provided (if the injured individual(s) is a worker of the person/company)
- b) The undertaking must identify the type of workers' compensation provided to any injured individuals associated with the alleged contravention.

Details of the support provided, and proposed to be provided, to the injured individual(s) to overcome the injury/illness

The undertaking must include the employment status of any injured individual(s) associated with the alleged contravention – whether the individual is a worker, subcontractor or visitor to the workplace.

The undertaking must also detail the support provided, and proposed to be provided, to any injured individual(s) to assist his/her quality of life following the incident (such as assistance with rehabilitation programs, retraining or re-employment) or adjustments at the injured individual's home.

9. The details of any existing SMS at the workplace including the level of auditing undertaken

The undertaking must include details about the SMS in place at the workplace including how often and what type of SMS auditing is conducted.

10. Details of any consultation undertaken within the workplace regarding the proposal of a WHS undertaking

The undertaking must include details about any consultation that has been undertaken within the duty holder's workplace(s) regarding the proposing of a WHS undertaking, including consultation with the health and safety representative (HSR) of the relevant workgroup and mine safety and health representative (MHSR) for a coal mine.

11. A statement of regret that the incident occurred

Include a statement indicating that the person sincerely regrets that the alleged contravention occurred. This does not need to be expressed as an admission of guilt (refer to section 216(3) of the WHS Act).

12. Any rectifications made as a result of the contravention

Detail the improvements that have been made to date within the workplace to rectify the situation that led to the alleged contravention. This may include the elimination of the hazards that led to the alleged contravention or the use of specific control measures to minimise risk where the hazard could not be eliminated.

Details of the costs of the rectifications must also be included.

**Note: The Regulator may seek to confirm any claims made in relation to the rectifications. Under section 268 of the WHS Act, it is an offence to give false or misleading information.**

13. An acknowledgment that the WHS undertaking may be published and publicised

The WHS undertaking must acknowledge that the undertaking may be published on the Regulator's website and may be referenced in the Regulator's publications.

The undertaking must also acknowledge that a public notice of the undertaking may be published in newspapers and other media as determined by the Regulator.

14. Statement of ability to comply with the terms of the undertaking

The person must acknowledge an ability to meet the financial and other terms of the undertaking.

**Note: The Regulator may require evidence to this effect, such as a statement from the person's accountant or financial auditor, or an agreement from a third party to publish a document in a journal.**

15. Statement regarding relationships with beneficiaries

Where an enforceable term involves the person making a donation, the undertaking must provide details of any relationships held with the beneficiary of the donation and how the reason for this donation will be communicated to the beneficiary.

16. Intellectual property licence

The person must grant the Regulator a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence to use, reproduce, publish, distribute, electronically transmit, electronically distribute, adapt and modify any materials developed as a result of the WHS undertaking.

17. Statutory declaration

The Regulator may require a statutory declaration outlining details of any prior work health and safety convictions or findings of guilt under any work health and safety legislation or work health and safety-related legislation.

**Note: This information will not be published in the undertaking, but will be used as part of the WHS undertaking evaluation process.**

18. A commitment to participate constructively in all compliance monitoring activities of the undertaking

The person must acknowledge responsibility for demonstrating compliance with the undertaking and that the Regulator will monitor to ensure compliance.

The acknowledgment must recognise that:

- the person will provide to the Regulator, by the due date for a term, evidence to demonstrate compliance with the term

- co-operation will be provided to the Regulator in the event that the Regulator chooses to undertake other compliance monitoring activities (such as a site visit) to verify the evidence provided
- material offered as evidence of compliance will be retained by the person throughout the period of the undertaking.

**Note: The Regulator may undertake compliance monitoring activities during the term of the undertaking. A final inspection may be conducted once all aspects of the undertaking have been implemented and are complete.**

19. A commitment that the behaviour that led to the alleged contravention has ceased and will not reoccur

The person must make a statement that illustrates a commitment that the behaviour that led to the alleged contravention has ceased and will not recommence.

20. A commitment to the ongoing effective management of WHS risks

The person must include a commitment to the ongoing management of WHS risks and describe the strategies that will be employed to satisfy the person's senior leadership (including officers as defined in section 4 of the WHS Act) that this commitment is being met.

21. Acknowledgement of overview and guidelines

The undertaking must include an acknowledgement that the publication Enforceable Undertakings Guideline has been read and understood, noting the version number of the document.

## Section B – enforceable terms

### 1. A commitment to cause to be published information about the undertaking

The person must publish a public notice in a newspaper or periodical. The public notice will be drafted using a script provided by the Regulator included as an appendix to the undertaking.

### 2. A commitment to disseminate information about the undertaking to workers, and other relevant parties (which may include work health and safety representatives), and in the annual report (if applicable)

The person must agree to disseminate information about the undertaking within the workplace, including to members of any health and safety committee, health and safety representatives, workers and other relevant parties. The person must state how the dissemination will occur and the timeframes for implementation.

### 3. Strategies that will deliver worker benefits

The person must include details of the tangible health and safety initiatives that will be delivered to benefit workers. Details must include the timeframes for implementation and estimated costs.

### 4. Strategies that will deliver industry benefits

The person must include details of initiatives that will be applied to benefit the relevant industry, with timeframes for implementation and estimated costs.

### 5. Strategies that will deliver community benefits

The person must include details of initiatives that will be implemented to benefit the community, with timeframes for implementation and estimated costs. These benefits must relate to workplace health and safety outcomes.

**Note: a person proposing a WHS undertaking may consider partnering with a third party such an industry body or community group, to deliver a project or strategy as part of the undertaking.**

### 6. A commitment regarding linking the promotion of benefits to the WHS undertaking

The undertaking must include a commitment that any promotion of a benefit arising from the WHS undertaking will clearly link the benefit to the undertaking and that the undertaking was entered into as a result of an alleged contravention.

### 7. A commitment to reimburse the Regulator's agreed costs associated with any monitoring of the enforceable undertaking

The Regulator may require the undertaking to include terms for the reimbursement of the Regulator reasonable costs in relation to investigating the original offence, reviewing the proposal and monitoring compliance. These costs should be discussed with the Regulator before proposing the enforceable undertaking.

### 8. Minimum spend

The person must include and acknowledge details of the minimum spend of the undertaking.

### 9. Project of undertaking

Where a project or projects are proposed to deliver benefits to workers, industry and community should be included as an appendix to the undertaking.

#### 10. Timeframe for delivery

The person must include a timeframe, either the number of months from acceptance or date, for delivery of the undertaking.

## General matters

- Ensure all personal names and references to particular genders are omitted – terms such as ‘manager’, ‘supervisor’, ‘worker’, ‘injured person’ should be used instead.
- Include the version number, date and page number on each page – a proposed undertaking may be resubmitted throughout the evaluation process following feedback from the Regulator. It is necessary for proposed undertakings to have version control.
- Ensure the proposed undertaking has been signed by the natural person if proposed by an individual, or by two duly appointed and authorised persons of the entity if proposed by a corporation. By signing the undertaking, the person agrees to comply with the terms of the undertaking if it is accepted by the Regulator. The proposed undertaking will not progress for evaluation or be considered unless it has been signed.

## Appendix B: Mining Act undertaking requirements

Note: A template is available to assist proponents in preparing an enforceable undertaking. Please contact the NSW Resources Regulator on 1300 814 609 to obtain the template or for further information. Please contact the NSW Resources Regulator to obtain the template or for further information.

### Section A: general information

#### 1. Details of the company or individual proposing the undertaking

This section must include the following information about the company or individual proposing the undertaking:

- contact details
- the type of legal structure (e.g. whether the individual is a natural individual, sole trader, partnership, body corporate or government agency)
- the type of business conducted (e.g. underground coal mine, open cut gold mine, basalt quarry, exploration company etc.).

#### 2. Details of the alleged contravention

Outline details of the alleged contravention.

#### 3. An acknowledgement that the Regulator has alleged a contravention has occurred

The undertaking must acknowledge that the Regulator alleges a contravention has occurred. For example: "It is acknowledged that Regional NSW has alleged [the entity or the individual] has contravened provisions of the Mining Act 1992."

#### 4. A statement of assurance about future legislative compliance

Make a statement that gives an assurance about future compliance with the Act. The terms of the undertaking will provide further illustration of this assurance.

#### 5. Any rectifications made as a result of the contravention

Detail the improvements that have been made to date to rectify the situation that led to the alleged contravention. This may include rectification of damage or loss, new procedures, work methods or worker training that seeks to reduce the potential for a repetition of the contravention in the future.

Details of the costs of the rectifications must also be included.

Note: The Regulator may seek to confirm any claims made in relation to the rectifications. Under sections 378C of the Mining Act it is an offence to give false or misleading information.

6. An acknowledgment that the undertaking may be published and publicised

The undertaking must acknowledge that the undertaking may be published on the Regulator's website and may be referenced in the Regulator's publications.

It must also acknowledge that a public notice of the undertaking may be publicised in newspapers and other media as determined by the Regulator.

7. Intellectual property licence

The person must grant the Regulator a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence to use, reproduce, publish, distribute, electronically transmit, electronically distribute, adapt and modify any materials developed as a result of the undertaking.

8. Acknowledgement of guidelines

The undertaking must include an acknowledgement that the publication Guideline Enforceable Undertakings has been read and understood, noting the version number of the document.

## Section B: enforceable terms

1. Dates and timings

Any dates or timeframes for completing actions set out in the enforceable undertaking must be clearly defined and fit within the proposed timeframe of the enforceable undertaking.

2. The enforceable undertaking must set out how the alleged offender will:

- a) address the conduct that led to the alleged contravention
- b) prevent that conduct from occurring again, for example by:
  - training of staff
  - undertaking works to prevent a recurrence
  - implementing a program to improve the alleged offender's overall compliance with the Act (an Internal Compliance Program or 'ICP').

3. Initiate tangible actions that will benefit industry and community

The person must include actions that will benefit other stakeholders including the industry as a whole and the community. The benefit must take into account any benefits the alleged offender has or will receive as a result of entering into the enforceable undertaking.

**Note: a person proposing an enforceable undertaking may consider partnering with a third party such an industry body or community group, to deliver a project or strategy as part of the undertaking.**

4. Reimburse the Regulator's agreed costs associated with any monitoring of the enforceable undertaking

The person must agree to reimburse the Regulator's reasonable costs in relation to investigating the original offence, reviewing the proposal and monitoring compliance with the undertaking if required. These costs should be discussed with the compliance co-ordinator before proposing the enforceable undertaking.

5. Details of persons responsible for the enforceable undertaking

This includes:

- a) the name of a senior manager or director who will be responsible for monitoring and complying with the undertaking (the contact officer)
- b) details of how the contact officer will monitor and report to the Regulator in relation to implementation of the undertaking, including the frequency of any reporting.

6. Any other matters relevant to the enforceable undertaking

Include any other commitments that will form part of the enforceable undertaking.

For example, an agreement to pay the Regulator's costs incurred. This includes costs of the investigation and any legal costs incurred in anticipated or potential legal proceedings.

7. Internal compliance programs

The Regulator may also require the person to prepare and implement an Internal Compliance Program (ICP). An ICP is a set of activities implemented to improve the company or person's overall compliance with the Act. Not all enforceable undertakings will include details of an internal compliance program, but if one is proposed the following elements must be included:

- a) details of monitoring and reporting mechanisms the company or person will adopt
- b) demonstrable board (if applicable) and senior management commitment to, and involvement with the entire program
- c) the assignment of responsibility for the compliance program to a named senior manager of the company
- d) the development and dissemination of a clear compliance program throughout the organisation
- e) the identification of compliance issues and operating procedures for compliance
- f) the development and delivery of a compliance training program to key personnel groups within the organisation
- g) the establishment of permanent procedural checking and monitoring mechanisms, such as nominating a compliance officer, establishing procedures to prevent future contraventions and to ensure that any potential contraventions are not only averted, but reported to senior management
- h) the commitment to an independent audit of the compliance program at regular intervals (usually annually), for a specified period (usually three years)
- i) a requirement to report to the Regulator at a specified time on the steps taken to implement the compliance program and the effectiveness of the compliance program.

## General matters

- Ensure all personal names and references to particular genders are omitted – terms such as 'manager', 'supervisor', 'worker' should be used instead.

## Enforceable Undertaking Guidelines

- Include the version number, date and page number on each page – a proposed undertaking may be resubmitted throughout the evaluation process following feedback from the Regulator. It is necessary for proposed undertakings to have version control.
- Ensure the proposed undertaking has been signed by the person, or by a duly authorised person. By signing the undertaking, the person agrees to comply with the terms of the undertaking if it is accepted by the Regulator. The proposed undertaking will not progress for evaluation or be considered unless it has been signed.
- A table of the proposed commitments and estimated costs should also be included as an appendix to the undertaking.