

# Guideline on AER approach to court enforceable undertakings

**March 2026**

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### **Important notice**

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The AER has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy prior to publication. This should be done prior to each publication edition, as AER guidance and relevant transitional legislation frequently change.

### **Amendment record**

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# Contents

Introduction .....	1
Undertakings .....	1
Acceptance of undertakings .....	2
Terms of an undertaking .....	2
Unacceptable terms .....	3
What happens once an undertaking has been accepted? .....	4
Compliance with undertakings .....	4
Variations or withdrawals .....	4
Breach of an undertaking .....	4
Attachment A - Template undertaking (based on section 288 of the NERL) .....	6
Attachment B - Legislation .....	10
Section 59A of the NEL – Enforceable undertakings .....	10
Section 230A of the NGL – Enforceable undertakings .....	10
Section 288 of the NERL – Enforceable undertakings .....	11

# Introduction

The Australian Energy Regulator (AER) uses a range of tools to encourage compliance and address contraventions of the national energy laws, including, the National Electricity Law (NEL) and National Electricity Rules (NER), National Energy Retail Law (NERL) and National Energy Retail Rules (NERR), and National Gas Law (NGL) and National Gas Rules (NGR) (energy laws and rules). This includes accepting written court enforceable undertakings given by persons under section 59A of the NEL, section 230A of the NGL and section 288 of the NERL (undertakings).

Undertakings may be accepted by the AER 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 AER.

This guideline provides an overview of undertakings and the AER's general approach to negotiating, accepting and administering undertakings in connection with its enforcement activities only. It is not intended to bind the AER to a position.

Given the wide variety of circumstances that may arise, this guideline is not intended to be applied as inflexible rules or to place limits on the AER's approach to enforcement action, but rather should be considered as general guidance indicative of the AER's approach. The AER will consider enforceable undertakings on a case-by-case basis, including the appropriateness of the terms contained within, in making a decision on whether or not to accept an undertaking. This guideline may be revised from time to time.

A template undertaking (based on section 288 of the NERL) is provided at **Attachment A**.

A copy of section 59A of the NEL, section 230A of the NGL and section 288 of the NERL is included at **Attachment B**.

## Undertakings

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

The AER 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 AER has a power or function under the energy laws and rules.

The AER 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 AER.

The AER considers undertakings to be an important tool to address non-compliance and does not accept them lightly.

## When are undertakings appropriate?

Undertakings can be an effective and flexible remedy to address concerning conduct. When deciding whether or not to exercise its discretion to accept undertakings, the AER's broad objectives are to:

- stop any concerning conduct
- provide redress for consumers and businesses adversely affected by concerning conduct

- encourage lasting compliance with the law to help prevent future breaches
- increase public awareness and promote general education and deterrence.

The AER, in deciding whether to accept an undertaking, will consider relevant factors including, but not limited to:

- the nature and extent of the concerning conduct in terms of the:
  - seriousness and deliberateness of the conduct, including the involvement of senior management
  - period over which the conduct extended and any related conduct
  - harm or potential harm to consumers or energy market participants
- alignment with the AER's [Compliance and Enforcement Policy](#) and [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 remedy harm or offer redress to affected consumers and businesses
- pre-existence of effective compliance programs and past corrective actions, 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 educative and/or deterrent effect of enforcement action that includes an undertaking
- prospects for an efficient resolution of the matter
- the apparent good faith of the business or individual.

## Acceptance of undertakings

The AER 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 AER. While an AER investigation team may canvass the possibility of an undertaking, discuss potential terms and make suggestions about which terms might be acceptable to the AER, they are not empowered to accept undertakings. This is ultimately the responsibility of, and a decision for, the AER Board 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 or as set out in the undertaking.

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

The AER will consider whether or not to accept an undertaking on a case-by-case basis. The AER'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 AER'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 specific terms of each undertaking are subject to negotiation between the AER 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 acknowledgement from the business or individual that the conduct of concern breached or could have breached the energy laws and rules. The AER considers that this 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 the requirement for a business or individual to appoint an independent expert to review compliance programs and systems with a view to making recommendations) aimed at preventing a recurrence of the conduct or other potential breaches of the energy law or rules.
- details of the corrective action (for example, consumer redress or independent audits of compliance systems and processes) that will be taken by the business or individual to effectively identify 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 customer refunds.
- a requirement to confirm compliance with the obligations of the undertaking by sending information or documents to the AER within specified timeframes.
- an acknowledgment that:
  - the AER will make the undertaking publicly available including by publishing it on the AER's website
  - the AER 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 AER's right to take further action.

In considering whether the duration of a proposed undertaking is acceptable, the AER 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.

## Unacceptable terms

While each undertaking will be considered on a case -by-case basis, examples of unacceptable terms include:

- denying the concerning conduct
- imposing obligations on the AER
- limiting the AER from taking enforcement action/remedy 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 AER has developed a template with common terms of an undertaking (Attachment A).<sup>1</sup> The terms of an undertaking will be tailored to the facts and circumstances of a particular matter.

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<sup>1</sup> Attachment A contains a template of an undertaking under s288 of the NERL.

# What happens once an undertaking has been accepted?

As outlined in our [Compliance and Enforcement Policy and Priorities](#), a key principle is to be open and accountable in our work while ensuring that the AER's enforcement outcomes are to be made public. The AER will publish undertakings to be open 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 AER's website. The AER may also refer to undertakings publicly, including in media releases, speeches and AER publications.

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

## Compliance with undertakings

Following acceptance of an undertaking, the AER requires that its implementation and effectiveness be monitored. Monitoring will generally be the responsibility of the business or individual concerned. Usually, undertakings require the business or individual to engage an independent expert to conduct reviews or audits.

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

## Variations or withdrawals

Undertakings may be varied or withdrawn with the consent of the AER. 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 AER 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.

Substantial variations to, or withdrawals of, undertakings are also published on the AER's website.

## Breach of an undertaking

The AER takes non-compliance with the terms of an undertaking seriously and may take action to enforce them. Where the AER 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 AER may also apply to the court for orders to remedy a breach of an undertaking. The NEL, NGL and NERL each provide<sup>2</sup> that the court, if it is satisfied that a person has breached a term of the undertaking, may make:

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<sup>2</sup> Section 59A of the NEL, section 230A of the NGL and section 288 of the NERL

- an order directing compliance with the undertaking
- an order for the business or individual to pay to the Commonwealth an amount up to the amount of any financial benefit they have obtained directly or indirectly and 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 undertaking (based on section 288 of the NERL)

## NATIONAL ENERGY RETAIL LAW

Undertaking to the Australian Energy Regulator given for the purposes of section 288 of the National Energy Retail Law

By

**[Regulated Entity (ACN or ABN)]**

### 1. Person(s) giving Undertaking

- 1.1. This Undertaking is given to the Australian Energy Regulator (**AER**) by **[Insert full name of Regulated Entity (Insert ACN or ABN)]** of **[Insert Physical Head Office Address]**, pursuant to section 288 of the National Energy Retail Law (**NERL**).

### 2. Background

**[Insert obligation name] obligations**

- 2.1. As a **[retailer/distributor]**, **[Insert Regulated Entity]** has certain obligations in relation to **[Insert obligation]** under the National Energy Retail Rules (**NERR**) as applied in accordance with the NERL.
  - 2.2. **[Insert sufficient detail about the obligations relating to the conduct of concern].**
- Conduct of concern*
- 2.3. **[Insert details regarding the conduct of concern].**
  - 2.4. **[This is to include, but not limited to, the date/dates/period the conduct occurred, the number customers impacted, what caused the conduct, if the breach was reported to the AER, what the AER is concerned about].**

### 3. Resolution

- 3.1. **[Insert Regulated Entity]** acknowledges that it has breached, or could have breached, its obligations under rule **[Insert Rule Number]** of the NERR to **[Insert obligation detail]**.
- 3.2. To address the breaches and to minimise the likelihood of future contraventions of the NERR, **[Insert Regulated Entity]** offers the Undertaking/s in clauses **[Insert clauses]**.

### 4. Commencement of the Undertaking

- 4.1. This Undertaking comes into effect when:
  - 4.1.1. the Undertaking is executed by **[Insert Regulated Entity]**; and
  - 4.1.2. the AER accepts the Undertaking so executed (**Commencement Date**).
- 4.2. Upon the Commencement Date, **[Insert Regulated Entity]** undertakes to assume the obligations set out in clauses **[Insert clauses]** below.

## 5. Expiry and variation

- 5.1. This Undertaking expires once [Insert Regulated Entity] has received written notice from the AER that the AER considers [Insert Regulated Entity] has satisfied its obligations under clause 6 (the Expiry Date).
- 5.2. [Insert Regulated Entity] may apply to withdraw or vary the Undertaking at any time, but this Undertaking will only be taken to be withdrawn or varied on the date on which the AER consents to such withdrawal or variation.
- 5.3. The AER may, if requested by [Insert Regulated Entity], expressly waive in writing any of the obligations contained in the Undertaking or extend the date or standard by which any such obligation is to be satisfied.

## 6. Undertaking/s

- 6.1. [Insert Regulated Entity] undertakes that it [Insert details of action to be undertaking – for example]:
  - 6.1.1. will not ...
  - 6.1.2. will ...

## 7. Acknowledgements

- 7.1. [Insert Regulated Entity] consents and acknowledges that:
  - 7.1.1. the AER may authorise a member of the AER or a member of the AER staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions the AER may impose;
  - 7.1.2. the AER will make this Undertaking publicly available including by publishing it on the AER's website;
  - 7.1.3. the AER will, from time to time, make public reference to the Undertaking in news media statements and in AER publications;
  - 7.1.4. the AER reserves its rights and remedies (including to institute legal proceedings against [Insert Regulated Entity] seeking penalties and other relief) in relation to any breaches of the NERR and NERL; and
  - 7.1.5. this Undertaking in no way derogates from the rights and remedies available to any other persons arising from the alleged conduct.

## 8. Costs

- 8.1. [Insert Regulated Entity] must pay all of its own costs in relation to the Undertaking.

## 9. Notification

- 9.1. Any notice or communication to the AER pursuant to this Undertaking must be sent to:

Name: General Manager AER Compliance & Enforcement

Address: Australian Energy Regulator

GPO Box 520

Melbourne VIC 3001

Attn: GM Compliance & Enforcement

Email: [AERCompliance@aer.gov.au](mailto:AERCompliance@aer.gov.au)

- 9.2. Any notice or communication to [Insert Regulated Entity] pursuant to this Undertaking must be sent to:

Name: [Insert name] – [Title]

Address: [Insert Regulated Entity]

[Address line one]

[Address line two]

Email: [Insert email address]

9.3. [Insert Regulated Entity] must notify the AER of any change to its contact details within five (5) *business days*.

## 10. Definitions

10.1. Terms used in this Undertaking are set out below. Italicised terms used in this Undertaking have the meaning given to those terms in the Retail Law or Retail Rules, as the case requires.

Term	Meaning
<b>AER</b>	Australian Energy Regulator
<b>Audit Scope</b>	Has the meaning as set out in [clause] of this Undertaking.
<b>Commencement Date</b>	Is the date the Undertaking comes into effect under [clause] of this Undertaking.
<b>Independent Auditor</b>	<p>A third party who is not a Related Body Corporate of [Insert Regulated Entity (ACN or ABN)].</p> <p>The third party carrying out the audit must:</p> <ul style="list-style-type: none"><li>• be able to act without bias and without any actual or potential conflicts of interest</li><li>• have professional competence to apply established audit standards and techniques to carry out the audit to a high standard</li><li>• have a system of quality controls to ensure audit reports are of a professional standard</li><li>• have relevant expertise</li><li>• be able to conduct the audit in accordance with the Audit Scope.</li></ul>
<b>Expiry Date</b>	Has the meaning as set out in [clause] of this Undertaking.
<b>Retail Rules</b>	Means the National Energy Retail Rules as applied from time to time.
<b>Retail Law</b>	Means the National Energy Retail Law set out in the Schedule to the <i>National Energy Retail Law (South Australia) Act 2011</i> as applied from time to time.

## Executed by

[Regulated Entity name (ACN)], by its authorised representatives in accordance with section 127(1) of the *Corporations Act 2001* (Cth).

.....  
[Name of Director]

Director

.....  
[Name of Director/Secretary]

[Director/Secretary]

**Date:**

**Accepted by the Australian Energy Regulator pursuant to section 288 of the *National Energy Retail Law*.**

.....  
[Name]

[Position]

**Date:**

# Attachment B - Legislation

## Section 59A of the NEL – Enforceable undertakings

- (1) The AER 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 AER has a function or power under this Law or the Rules.
- (2) A person may withdraw or vary the undertaking at any time, but only with the consent of the AER.
- (3) If the AER considers that the person who gave the undertaking has breached any of its terms, the AER 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 any or all 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 the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is attributable to the breach;
  - (c) an 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.

## Section 230A of the NGL – Enforceable undertakings

- (1) The AER 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 AER has a function or power under this Law or the Rules.
- (2) A person may withdraw or vary the undertaking at any time, but only with the consent of the AER.
- (3) If the AER considers that the person who gave the undertaking has breached any of its terms, the AER 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 any or all 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 the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is attributable to the breach;
  - (c) an 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.

## Section 288 of the NERL – Enforceable undertakings

- (1) The AER 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 AER has a function or power under this Law or the Rules.
- (2) A person may withdraw or vary the undertaking at any time, but only with the consent of the AER.
- (3) If the AER considers that the person who gave the undertaking has breached any of its terms, the AER 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 any or all 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 the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is attributable to the breach;
  - (c) an 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.