



Concordia Pacific

Environmental, Government and Town Planning Law

## FACT SHEET CONCERNING “ENFORCEABLE UNDERTAKINGS”

An amendment to the *Protection of the Environment Operations Act* has made it possible, for the first time, for businesses to negotiate a settlement with the New South Wales Environment Protection Authority (“EPA”) concerning a pollution incident.

Section 253A of the POEO, which came into effect on 1 May 2006, enables the EPA to accept a “written undertaking” concerning any matter which comes within the scope of the EPA’s regulatory authority. Before section 253A was added to the POEO, the EPA essentially had only one enforcement mechanism to address contraventions, namely criminal proceedings in either the Local Court or the Land and Environment Court to impose penalties. These proceedings cannot be “settled” by negotiation with the EPA of an agreed-upon penalty amount; the fine is always determined by a judge following a sentencing hearing.

The new provision allowing for enforceable undertakings is particularly beneficial to the regulated community, as it gives the EPA an alternative way to respond to environmental breaches that does not involve criminal prosecution. Therefore, an administrative settlement can be reached with the EPA without the need for costly and time-consuming proceedings before a court, and without a conviction being recorded (and consequently without the injury to business reputation that accompanies a conviction).

In appropriate circumstances – particularly where the breach was accidental and did not result in significant environmental harm – it may be advantageous to approach the EPA and offer to give an enforceable undertaking.

The key provisions of section 253A are as follows:

- An enforceable undertaking can relate to any subject matter that is regulated under the POEO.
- An undertaking can be withdrawn only with the written consent of the EPA (and therefore should only be given after careful consideration).
- The breach of an undertaking may result in serious consequences. Not only can the EPA apply to the Land and Environment Court for an order requiring that the undertaking be complied with; the EPA can also seek orders:
  - a) requiring the party who has given the undertaking to pay to the State an amount equal to the financial benefit that has been achieved as a result of the breach;
  - b) requiring compensation to be paid to any person who has suffered damage as a result of the breach;
  - c) suspending or revoking an environmental protection license that is held by the person giving the undertaking; and
  - d) requiring that any actual or likely environmental harm caused by the breach be made good

In August 2009, the EPA published guidelines which outline the circumstances under which the EPA would be prepared to accept an enforceable undertaking. They are as follows:

- The EPA believes that a breach of the POEO has occurred or is about to occur.
- The EPA considers that the undertaking is an appropriate regulatory outcome, having regard to the significance of the issues concerned to the environment and the community.
- The EPA has determined that the company proposing the undertaking is likely to comply with it, after having taken into account the history of complaints against the company and its general compliance record.

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- The company is prepared to admit that the EPA has reason to “be concerned” about the breach.
- The breach is relatively minor in nature.
- The acceptance of the undertaking will result in an expeditious resolution of the matter.

The EPA’s guidelines also specify that an enforceable undertaking must include the following terms:

- The company will stop the conduct or alleged breach that is of concern to the EPA and will not recommence the conduct.
- The undertaking must describe how the company will address the conduct that the EPA is concerned about, prevent the conduct from occurring again, and rectify the consequences of the conduct.

The EPA will not agree to include a clause in an enforceable undertaking by which the company giving the undertaking denies liability.

The EPA requires that enforceable undertakings be a matter of public record, and that they be recorded in the EPA’s public

As at January 2010, the EPA had accepted enforceable undertakings in 5 cases. A description of those cases is provided below.

#### **Cases Where Enforceable Undertakings Have Been Accepted By the EPA**

**Delta Electricity:** The Company had notified the EPA that it had discharged diluted sulphuric acid into an outlet canal at one of its power stations. The undertakings required Delta to fund weed control works at a nature reserve at a cost of \$45,000.

**HTT Huntley Heritage:** The Company gave the EPA an undertaking that it would comply with a condition of its environment protection license relating to the nature of the waste material that could lawfully be disposed at its landfill.

**Kosciuszko Thredbo Pty Ltd:** A tank containing diesel fuel overflowed and as a result an unknown volume of diesel was released into the Thredbo River. Kosciuszko Thredbo gave undertakings to fund riparian rehabilitation works on the Thredbo River in the amount of \$100,000 and to pay the investigation and legal costs that the EPA incurred in connection with the spill of \$25,000.

**Leighton Contractors Pty Limited:** The EPA became aware of an incident where sediment laden water was pumped from sediment basins that were being used in connection with a highway construction project. The undertakings required Leighton to provide labour to remove willow trees from a 1 kilometre section of a creek and to pay the EPA’s investigative and legal costs in the amount of \$14,000.

**Veolia Environmental Services:** The EPA had issued a prevention notice requiring Veolia to conduct monitoring and install a cap on a landfill. Veolia gave undertakings to provide a bond of \$100,000 as a guarantee that it would perform the remedial work required by the notice.

If the EPA is investigating a pollution incident at your facility, it may be appropriate to approach the agency to find out whether it would be prepared to accept an enforceable undertaking. It would be best to act promptly, before any charges are laid (preferably when the EPA’s investigation is at an early stage. Concordia Pacific can help you to formulate the terms of a proposed undertaking and can negotiate the settlement with the EPA. If you require our assistance, please call us on **9233 4914**.

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