

ENFORCEABLE UNDERTAKINGS ROUNDTABLE

Melbourne Law School

Tuesday 23 June, 9:30am to 4:00pm



EPA
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SLRC
Socio-Legal
Research Centre

PROGRAM
ENFORCEABLE UNDERTAKINGS ROUNDTABLE

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Melbourne Law School (185 Pelham St, Carlton)
Seminar room 223 (2nd floor)

9:30 – 10:00am	Registration (refreshments available)
10:00 – 10:40am	Welcome Setting the scene (Richard Johnstone) Introduction to key questions for discussion (Christine Parker)
10:40am – 12:30pm (incl. break for coffee/tea)	Roundtable Discussion: 1. Decision-Making Process for EUs 2. Content of EUs
12:30 – 1:30pm	Lunch
1:30 – 3:40pm (incl. break for tea/coffee)	Roundtable Discussion (continued): 3. Accountability, Transparency and Inclusion of Stakeholders in Negotiation and Content of EUs 4. Monitoring and Measuring Effectiveness of EUs.
3:40 – 4:00pm	Close (Christine Parker)

We are very grateful for the sponsorship of the Victorian Environmental Protection Authority which has made this Roundtable possible. We are also grateful for the support of the Centre for Employment and Labor Relations Law and Centre for Corporate Law and Securities Regulation, Melbourne Law School and also the Centre for Socio-legal Studies, Griffith University.

Important: Recording of Session

We plan to digitally record and transcribe the discussion throughout the day so that a summary of the discussion can be distributed to participants.

If you would prefer that all or any of your comments not be transcribed and included in any summary of discussion, please let Christine Parker (Ph. 03 8344 1093; email c.parker@unimelb.edu.au) know either before or after the roundtable. If you do not want your comments included, they will not be included in the transcription or written summary of discussion provided to participants. The audio recording will be deleted as soon as it has been accurately transcribed.

If we think at a later stage that it would be useful to publish material from the summary of discussion more widely beyond the group, we will contact all participants to expressly ask for your permission and give you a chance to check what comments of yours are to be included, and whether you wish to be named or not. You will be able to choose to withdraw your comments at that stage even if they have been included in an earlier summary.

ISSUES FOR DISCUSSION: ENFORCEABLE UNDERTAKINGS

Richard Johnstone (Griffith University School of Law) and

Christine Parker (Melbourne Law School)¹

Introduction

Enforceable undertakings (EUs) are promises enforceable in court, offered by an individual or firm who has allegedly breached the law and accepted by a regulator. The EU serves as a substitute for, or augmentation of, other regulatory enforcement methods such as civil, administrative, or even criminal action. EUs are designed to secure quick and effective remedies for contraventions of regulatory provisions and provide non-adversarial and constructive solutions to regulatory compliance issues.

EUs are an Australian invention. The concept was developed by the Australian Competition and Consumer Commission. The Australian Competition and Consumer Commission and Australian Securities and Investments Commission have had the legislative power to accept EUs since 1993 and 1998 respectively. In more recent years, many other federal and state regulatory agencies have been given the power to accept EUs. Some have used this power quite extensively and creatively. Others have not used it at all yet or have only just received the power.

The purpose of this roundtable is to share insights and experience about how best to use the power to accept EUs, and what issues need to be addressed in doing so. Discussion will be organized around the following four topics in relation to EUs. This document provides a brief explanation of each topic and a few key questions for discussion. Please come prepared with some answers and examples.

¹ Based on Richard Johnstone and Michelle King, "A responsive sanction to promote systematic compliance? Enforceable undertakings in occupational health and safety regulation" (2008) 21 *Australian Journal of Labour Law* 280; Christine Parker, "Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings" (2004) 67 *Modern Law Review* 209.

The Decision-Making Process

Many regulators have engaged in extensive policy development and consultation as to the factors they will take into account in deciding whether to accept an enforceable undertaking and the process they will use in making that decision.

Roundtable participants are invited to briefly outline what policies and practices they have developed about the factors to be taken into account in deciding whether to accept an EU and the process for weighing those factors and coming to a decision:

- What is the type of matter in which you would typically see an EU as the best outcome?
- In what conditions will you not accept an EU?
- What sort of process do you use for making the decision? (Eg How far up the agency is the decision made? To what extent are stakeholders represented in the decision-making body? Is there a formal way of setting out the factors for and against? Are there certain preconditions that must be met before an EU is considered? What sort of review is there before the EU is signed off?)

It has been suggested that enforceable undertakings are most effective when they represent a genuine negotiated resolution to a regulatory compliance problem. But producing effective and individually tailored undertakings is a time-intensive process. In some situations either the regulator or the firm might largely determine the terms of the EU:

- How do you actually negotiate and agree the terms of the EU? (Face to face? Via lawyers? Do you have a suggested template?)
- To what extent do you find that negotiations over the terms of EUs are protracted?
- In your experience, what sort of negotiation process works best?

The Content of Enforceable Undertakings

One of the main suggested advantages of EUs is that the promises made in an EU can go beyond “mere compliance” and the payment of financial penalties. The terms will generally relate to remedying the harm caused by the alleged breach (eg providing compensation to those damaged) and improvements to the firm giving the EU in terms of how it ensures compliance with the law and achievement of the overarching goals of regulation (eg implementation of compliance systems, health and safety management systems etc). EUs might also include terms that seek to benefit the broader industry or community (eg an industry compliance education program or funding for research into how to prevent pollution accidents in the future).

Roundtable participants are invited to share their policies and practice around what they generally expect as standard terms of EUs, and also to provide examples where they feel they have been able to negotiate more creative terms in an EU that have solved a regulatory problem or created a particular benefit for the industry or a community.

- Do you have certain standard terms that you always expect to see in an EU? Why do you see these as important? What has been your experience with them?
- Do you have certain things that you would never accept in an EU?
- Do you always require firms to implement some sort of compliance management system (or health and safety, environmental management system as appropriate)? If so, how do you require this to be worded? Is it tailored to the particular firm or a more standard sort of requirement?
- Are there any examples where you have been able to use an EU particularly creatively to solve a problem in an individual firm or in an industry, or to provide some broader community benefit?

Accountability, Transparency and Inclusion of Stakeholders in Negotiation and Content of Enforceable Undertakings.

To be effective enforcement mechanisms, there need to be public confidence in the process of accepting or rejecting applications for undertakings, and enforceable undertakings need to be monitored and enforced. Accountability is central to the successful operation of EUs and operates at two key stages: in decision-making and in performance (monitoring implementation of EUs by firms).

Accountability, transparency and inclusion in decision-making:

- What formal accountability and transparency mechanisms govern your decision-making about EUs? Eg is judicial review available? Has it been used? Are EUs published on a public register? Do you ever get any feedback from industry or the wider public about the terms of EUs you have negotiated?
- Do you do anything to get the opinion of affected parties (or their representatives) before deciding whether to accept or reject an EU? Have they ever been included in the actual negotiation of the terms of the EU with the firm? What about independent experts? How is this done? Do you think this has been effective?
- Have there been any situations where people have been unhappy with the terms of an EU? What happened?

Accountability, transparency and inclusion in performance (monitoring) of EUs:

- How do you monitor compliance with EUs? How do you know whether the firm has complied with the terms of the EU or not?
- Do you require the firm to hire independent experts or reviewers to report on their implementation of the terms of the EU? If so, what conditions do you put around this process? Eg do you have to agree as to who is appointed? The form which their report will take and so on?
- Have you ever required the firm to consult with affected parties as part of the implementation of the terms of the EU? How has this worked?
- What do you do if you discover non-compliance with an EU or a problem with implementation of EUs?
- Have there been any situations where you have needed to enforce an EU?

Effectiveness

EUs show a great deal of promise as a more effective and efficient way to solve regulatory problems and to promote compliance than court proceedings and financial penalties. There have been a few academic papers seeking to evaluate the effectiveness of EUs by looking at the terms of the EUs and conducting stakeholder interviews. But ultimately, regulators will probably need to conduct their own reviews of the costs and benefits of EUs in order to judge whether they meet their promise or not.

Evaluating the effectiveness of EUs is probably still an emerging area of policy and practice. Roundtable participants are invited to share any experiences they have with evaluating the effectiveness of the EUs they have accepted and to brainstorm about ideas for further evaluation in the future:

- What happens after the EU is agreed? (Eg are there reviews? Further meetings? How do you review whether they have worked well or not?)
- What experiences have you had with evaluating EUs? What were the criteria for evaluation? How was the evaluation undertaken?
- What should be the criteria for evaluation of EUs? (Eg timeliness of the process for negotiating EUs; firm or stakeholder satisfaction; the dollar value of promises made; whether firms comply with their undertakings; improvements in overall compliance...?)
- What might be useful ways forward for evaluating EUs?