

Enforceable undertakings guidelines

Submitting, varying or withdrawing
undertakings

June 2024

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Summary

From 16 May 2024, Energy Safe Victoria may accept an undertaking from a person (a natural person or body corporate) as a resolution to a contravention or alleged contravention of the *Electricity Safety Act 1998*, the *Gas Safety Act 1997* or regulations made under those Acts. A person may only vary or withdraw an accepted undertaking with our consent, and we can enforce compliance with an undertaking in the Magistrates' Court.

An undertaking contains commitments by the person to do certain things within a specified timeframe, often with the primary aim of preventing a recurrence of the conduct that led to the contravention or alleged contravention. They also often provide redress for persons who were adversely affected by the conduct, implement measures to address compliance concerns and provide general education and deterrence for others by way of publication to raise awareness.

These guidelines are to assist persons to understand the legal framework and our approach to the use of undertakings as a compliance and enforcement tool. They provide information about:

- Energy Safe's power to accept an undertaking
- the process for proposing an undertaking to Energy Safe
- the form and contents of undertakings
- the process for varying or withdrawing an accepted undertaking, and
- non-compliance with an accepted undertaking.

These guidelines should be read in conjunction with our *Compliance and Enforcement Policy* and our *Prosecution Guidelines*, which set out how we make decisions regarding enforcement action and proceedings.

Disclaimer

These guidelines give general information about the use of undertakings under the Electricity Safety Act and the Gas Safety Act. However, it is not a substitute for obtaining legal advice. Omission of any matter from these guidelines does not relieve a person of their legal duties.

1 Background

This chapter sets out the legislative framework relating to undertakings, outlines the defined terms used in these guidelines and provides information about our publication of accepted undertakings.

1.1 Legislative framework

1.1.1 Energy Safe's power to accept an undertaking

The *Energy Legislation Amendment (Energy Safety) Act 2023* amends the Electricity Safety Act and the Gas Safety Act with effect from 16 May 2024, to introduce new powers allowing Energy Safe to accept undertakings.

Under section 141D(1) of the Electricity Safety Act and section 109C(1) of the Gas Safety Act, Energy Safe may accept a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention by that person of those Acts or associated regulations.

1.1.2 Consequences of giving an undertaking

Once an undertaking is accepted by Energy Safe, the person who gave the undertaking may only vary or withdraw the undertaking with our written consent.

We cannot commence a proceeding for an offence against the Electricity Safety Act, the Gas Safety Act or associated regulations constituted by a contravention or alleged contravention to which an accepted undertaking relates, if the undertaking:

- is in effect and is being satisfied, or
- has been fully satisfied and discharged.

1.1.3 Enforcement of an accepted undertaking

If Energy Safe considers that a person has contravened their accepted undertaking, we may apply to the Magistrates' Court for an order that:

- the person complies with the undertaking or take specified action to comply with the undertaking, or
- any other order the Court considers appropriate.

1.2 Defined terms

Words and phrases used in these guidelines have the same meaning as given under Victoria's energy safety laws (as noted in Table 1) unless otherwise specified.

Table 1: Defined terms used in these guidelines

Term	Defined in	Definition
person	Electricity Safety Act, s3 Gas Safety Act, s3	Includes a natural person or body corporate, it also includes an unincorporated body or association and a partnership.
Victoria's energy safety laws	These guidelines	Comprises the <i>Electricity Safety Act 1998</i> (Vic), the <i>Gas Safety Act 1997</i> (Vic), the

	<i>Pipelines Act 2005 (Vic)</i> and any regulations made under those Acts.
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1.3 Publication of accepted undertakings

Energy Safe publishes accepted undertakings on a register on our website. We may also publicise information on an accepted undertaking including compliance with the undertaking (for example, in media releases). This is to ensure transparency, increase industry and public awareness of energy safety issues, and deter non-compliance with Victoria's energy safety laws.

We publish information in accordance with our *Privacy Policy*. Our approach to commercially sensitive and confidential information is discussed in chapter 2.

2 Proposing, varying or withdrawing an undertaking

This chapter provides information about proposing an undertaking, the form and contents of undertakings and the process for varying or withdrawing an accepted undertaking.

2.1 Proposing an undertaking

2.1.1 Approaching Energy Safe about a proposed undertaking

A person may approach Energy Safe to propose an undertaking, or to discuss the option of giving an undertaking, to resolve a contravention or alleged contravention of the Electricity Safety Act, the Gas Safety Act or regulations made under those Acts. This can be done at any time but, where we have commenced proceedings, this must be done before those proceedings are finalised.

In the first instance, any correspondence concerning proposed undertakings should be submitted by email to prosecutions@energysafe.vic.gov.au.

In some circumstances, we may raise the potential for an undertaking to resolve a matter with the person, in writing or verbally, for their consideration. If the person decides to pursue the option of an undertaking, they are responsible for drafting and submitting the proposed undertaking.

2.1.2 When Energy Safe is unlikely to consider or accept an undertaking

Unless there are exceptional circumstances, we are unlikely to consider or accept an undertaking for incidents where there has been a death or very serious injury and we intend to, or have, commenced proceedings against the person. In these circumstances, the person proposing the undertaking would have to demonstrate that, by their undertaking, they will deliver benefits to affected persons and the wider community that would not be achieved in the normal course of prosecution. As noted in section 2.3, we will also consider the views of affected persons.

Other circumstances in which we are unlikely to consider or accept an undertaking are as follows:

- Where the person is alleged to have been reckless and in doing so exposed others to the risk of death or very serious injury.
- Where the person has previously been convicted of a similar contravention of Victoria's energy safety laws.
- For minor contraventions, where the costs outweigh the benefits.

That said, we consider each proposal on its merits and exercise a broad discretion after taking into account all the relevant information and factors, including as outlined in our *Compliance and Enforcement Policy* and our *Prosecution Guidelines*.

2.2 Form and contents of an undertaking

2.2.1 Form of an undertaking

A proposed undertaking must be clear and comprehensive. The person proposing the undertaking is responsible for drafting the undertaking at their own expense, noting that Energy Safe will not engage in extensive discussions over drafting.

To be capable of acceptance, a proposed undertaking must:

- be in writing
- be in connection with a matter relating to a contravention or alleged contravention of the Electricity Safety Act, the Gas Safety Act or regulations made under those Acts
- be given by the person who contravened or allegedly contravened the above Act(s) or regulations, and
- be signed by the person giving the undertaking.

A template undertaking is at Attachment 1.

2.2.2 Contents of an undertaking

Generally, Energy Safe will only consider an undertaking if it contains both 'general information' and 'enforceable terms' as described below.

General information

General information provides Energy Safe and others reading the undertaking with background on the person giving the undertaking and relevant matters surrounding the contravention or alleged contravention.

General information that we expect in an undertaking includes:

Details of the person proposing the undertaking

- An undertaking must clearly identify the person proposing the undertaking. This must include the name, address and ABN or ACN (if applicable) of the person.

Details of events surrounding the contravention or alleged contravention

- An undertaking must include details of the conduct and any relevant factual events surrounding the contravention or alleged contravention (for example, incident details).
- If applicable, an undertaking should also include details of any harm caused to people or property because of the contravention or alleged contravention.
- Do not include individuals' names or gender. Instead, use suitable terms that best describe the individual's relationship to the contravention or alleged contravention such as 'injured worker' or 'member of the public'.

Acknowledgement of the contravention or alleged contravention and actions to date

- An undertaking must include an acknowledgement that a contravention had occurred or that Energy Safe has alleged that a contravention has occurred, including reference to the relevant Act(s) and/or regulations.
- If applicable, an undertaking should also include details of any actions taken by the person to date to address the conduct of concern and/or any harm caused.
- An undertaking should also include details of any other compliance and enforcement action taken by Energy Safe or another regulatory or government agency in relation to the contravention or alleged contravention (e.g., type of notice, actions required) and the person's response or actions taken.

Acknowledgment of publication, providing records or information and covering costs

- An undertaking must include an acknowledgement that Energy Safe will publish a copy of the undertaking on its website and may publish and/or publicise information related to the undertaking including compliance with the undertaking.
- Also, that the person will produce any records or information in relation to anything they are required to do under the undertaking to Energy Safe if requested during the term of the undertaking or within seven (7) years following the conclusion of the undertaking.
- An undertaking should also acknowledge that the person will pay all their own costs in relation to the undertaking and its implementation.

Enforceable terms

Enforceable terms are the things the person commits to completing. Each term must be relevant, achievable and clearly defined in a way that allows Energy Safe to assess or measure whether the thing has been completed. Where possible and applicable, terms should have a nominated timeframe for completion.

Enforceable terms that we expect in an undertaking include:

General commitment

- An undertaking must include a commitment that the conduct that led to the contravention or alleged contravention has ceased and will not reoccur.

Commitment to specified actions

- An undertaking must provide details of the things the person will do to prevent the conduct that led to the contravention or alleged contravention from reoccurring, the estimated costs of doing those things, and the timeframes in which they will be completed.
- If applicable, an undertaking should include details of redress for persons who were adversely affected by the conduct that led to the contravention or alleged contravention, the estimated costs of redress and the timeframes in which it will be completed.
- If applicable, an undertaking should include details of any other measures that will be implemented to address compliance concerns raised by Energy Safe, such as a compliance improvement action plan.
- Actions should have broad reach and, for example, may include initiatives such as implementing special training programs for workers, the development of manuals and/or guides, industry-wide or public education campaigns.

Monitoring and reporting

- An undertaking must include details of the compliance monitoring and reporting program the person will implement to ensure compliance with the undertaking.
- An undertaking must include a commitment that the person will keep records in relation to the things they have committed to do in the undertaking and will retain those records for period of at least seven (7) years following the conclusion of the undertaking.
- An undertaking must also include a commitment to provide a final report to Energy Safe, at the appropriate time, detailing the implementation and conclusion of the undertaking.

2.2.3 Unacceptable inclusions in an undertaking

An undertaking must not include:

- a denial of liability
- downplay the severity of the contravention or alleged contravention

- any terms which seek to limit Energy Safe's enforcement options or set up defences for possible future contraventions of Victoria's energy safety laws
- any terms that impose obligations on Energy Safe or third parties, or
- statements that appear to serve public relations purposes or that are otherwise superfluous to the undertaking.

2.2.4 Commercially sensitive and confidential information

As noted at section 1.3, Energy Safe publishes accepted undertakings on our website.

Where a person considers any part of the information in their proposed undertaking is commercially sensitive or confidential and should not be published, the person should at the time of submitting the proposed undertaking:

- clearly identify the content that it considers to be commercially sensitive or confidential
- provide reasons why the content is commercially sensitive or confidential, and
- provide a public version of the document with the commercially sensitive or confidential information redacted to allow for publication.

If we accept that the identified content is commercially sensitive or confidential, we will not publish or release that information except as required or allowed by legislation.

2.3 Decision

Energy Safe will only accept an undertaking if we are satisfied that it is an appropriate resolution to the contravention or alleged contravention. The general information and enforceable terms in an undertaking must be sufficiently detailed and measurable to ensure accountability and transparency.

Our evaluation of a proposed undertaking relies upon the information provided in it, but we may verify the information provided. We may also consider any other relevant information including the views of affected persons. While the views of affected persons are given due weight and consideration, the final decision rests with Energy Safe.

Once we have made a decision to accept or reject a proposed undertaking, we will inform the person of our decision in writing. Where we decide to reject a proposal, we will also provide the reasons why.

Where we accept an undertaking, we will publish the accepted undertaking on our website and cease any court proceedings (see chapter 1). The undertaking becomes enforceable on acceptance.

Varying, withdrawing and complying with an accepted undertaking is discussed in the next section.

2.4 Varying or withdrawing an accepted undertaking

An accepted undertaking can only be varied or withdrawn with the written consent of Energy Safe. If we do not consent to varying or withdrawing an accepted undertaking, it will remain in force as is.

In the first instance, any correspondence concerning a variation or withdrawal of an accepted undertaking should be submitted by email to prosecutions@energysafe.vic.gov.au.

Once we have made a decision to accept or reject a proposed variation or withdrawal of an accepted undertaking, we will inform the person of our decision in writing. Where we decide to reject a proposal, we will also provide the reasons why.

Where we agree to a variation, we will publish the varied undertaking on our website along with the original undertaking. Where we agree to withdraw an undertaking, we will update our website to reflect this, however, the original undertaking will remain published.

3 Non-compliance

Failure to comply with an accepted undertaking is an offence under the Electricity Safety Act and the Gas Safety Act. The maximum penalty for failure to comply with an accepted undertaking:

- 500 penalty units in the case of a natural person (\$96,155 as at May 2024), or
- 2500 penalty units in the case of a body corporate (\$480,775 as at May 2024).¹

Energy Safe may apply for a court order to enforce compliance with the undertaking. Additionally, Energy Safe may commence or resume proceedings (or take other enforcement action) for the original offence that the accepted undertaking related to.

¹ One penalty unit is currently \$192.31, from 1 July 2023 to 30 June 2024.

Attachment 1 – Template undertaking

This template has been provided to assist persons to draft an undertaking. It is a guide only. The terms of an undertaking must be tailored to suit the facts and circumstances of the matter.

ENFORCEABLE UNDERTAKING

Undertaking to Energy Safe Victoria under [section 141D of the *Electricity Safety Act 1997* / section 109C of the *Gas Safety Act 1998*]

by

[Full Name and ABN or ACN if applicable]

1. Person giving this Undertaking

- 1.1 This Undertaking is given by [Full Name, Address and ABN or ACN (if applicable)] to Energy Safe Victoria, for the purposes of [section 141D of the *Electricity Safety Act 1997* (Vic) (**Act**) / section 109C of the *Gas Safety Act 1998* (Vic) (**Act**)].

2. Background

- 2.1 [If applicable, insert a description of the Company/Individual's business and activities in Victoria, company structure and office holders, and any licences or approvals issued by Energy Safe to the Company/Individual].

3. Details surrounding the contravention or alleged contravention

- 3.1 [Insert details of the conduct and any relevant factual events surrounding the contravention or alleged contravention (e.g., incident details) and any harm caused].
- 3.2 [Explain why the conduct contravenes or Energy Safe alleges that the conduct contravenes the relevant Act or regulations].

4. Acknowledgement and resolution

- 4.1 [Insert statement that the Company/Individual acknowledges that they have contravened, or that Energy Safe has alleged that the Company/Individual has contravened, the relevant Act or regulations].
- 4.2 [Insert statement that the Company/Individual has ceased the conduct that led to the contravention or alleged contravention, and that the conduct will not reoccur].
- 4.3 [If applicable, insert details of any actions taken by the Company/Individual to address the conduct that led to the contravention or alleged contravention and/or any harm caused, when they were done and the costs involved in implementing those actions].
- 4.4 [If applicable, insert details of any response or actions taken by the Company/Individual to other compliance and enforcement action that has been taken by Energy Safe or another regulatory or

government agency in relation to the contravention or alleged contravention, in addition to offering this Undertaking].

4.5 The [Company/Individual] undertakes to:

- (a) [If applicable, set out actions that the Company/Individual will take to prevent, rectify or mitigate any risks or harms caused by the contravention or alleged contravention, the estimated costs of the actions, and the timeframe in which each action will be completed].
- (b) [Set out actions that the Company/Individual will take to prevent any other contravention of Victoria's energy safety laws and promote and enhance compliance generally, the estimated costs of the actions, and the timeframe in which each action will be completed].
- (c) [Set out actions that the Company/Individual will take to result in energy safety benefits to industry and/or communities, the estimated costs of the actions, and the timeframe in which each action will be completed].
- (d) [Set out details of a Compliance Monitoring and Reporting Program that the Company/Individual will implement to ensure compliance with the Undertaking. Include steps and details (e.g., evidence that will be provided) to demonstrate how compliance with actions will be monitored and reported on to Energy Safe at appropriate intervals for the term of the Undertaking, including a final report within one month of the conclusion of the term of the Undertaking].

5. Commencement and term of Undertaking

5.1 This Undertaking comes into effect on the Commencement Date, being the date when:

- (a) this Undertaking is executed by [Company/Individual]
- (b) this Undertaking so executed is accepted by Energy Safe, and
- (c) the [Company/Individual] is given written notice of Energy Safe's acceptance of the Undertaking.

5.2 This Undertaking remains in effect for [xx months/years] from the Commencement Date.

6. Publication and records

6.1 [Company/Individual] acknowledges that:

- (a) it will produce any records or information in relation to any actions, steps, or measures it is required to take under this Undertaking to Energy Safe if requested at any time during the term of the undertaking or within seven (7) years of the conclusion of the Undertaking.
- (b) Energy Safe will make this Undertaking publicly available by publishing it on its website and may publish and/or publicise information on this Undertaking and the [Company/Individual's] compliance with the obligations.

6.2 [Company/Individual] acknowledges it must pay all its own costs in relation to this Undertaking including costs associated with the actions, implementation of the Compliance Monitoring and Reporting Program any other relevant terms such as an independent audit.

Execution of the Undertaking

Signed/Executed by [insert Full Name and ABN or ACN if applicable]:

[Name, Position if relevant]

Date

Accepted by Energy Safe Victoria under [insert relevant section and Act]:

[Name, Chairperson/CEO/General Manager]

Date